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THE PRINCIPLES

OF THE

LAW OF CONTRACTS AND TORTS

WITH

A SHORT OUTLINE OF THE LAW OF EVIDENCE

BEING

INDERMAUR'S COMMON LAW

RE-WRITTEN AND ENLARGED

BY

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SECOND EDITION

LONDON:

SWEET & MAXWELL, LIMITED,

2 & 3 CHANCERY LANE, W.C.2.

TORONTO:
THE CARSWELL COMPANY, LIMITED.

SYDNEY, MELBOURNE, BRISBANE:
THE LAW BOOK COMPANY OF AUSTRALASIA, LIMITED.

1927.

(Printed in England.)

PRINTED IN GREAT BRITAIN BY
THE EASTERN PRESS, LTD., READING.

PREFACE.

THE increase in size in this edition is due principally to the expansion of the sections on Agency, Contracts of Affreightment, and Workmen's Compensation, which were formerly too short to be of much value. It is, I think, clear that the limits of size have now been reached, and that, in order to gain space for inevitable additions, some subjects must be omitted from future editions. Probably that space will best be obtained by leaving out the existing section on Patents, Copyrights and Trade Marks.

The volume and character of modern legislation makes it very unlikely that I have avoided errors and omissions and will probably soon make it quite impossible to produce a book of this character.

As I stated in the Preface to the first edition, it is impracticable and, owing to the arrangement of the subject-matter, unnecessary to provide a more elaborate Index.

The most material provisions of the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, are printed in an Appendix and should be read carefully by students *before* beginning the book.

I have again received much valuable assistance from Dr. A. W. Peake of Gray's Inn, who has very kindly read and corrected the proofs.

A. M. W.

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ERRATA AND ADDENDA.

P. 120, note (*r*).—*Add* : See also *Putsman* v. *Taylor*, [1927] 1 K. B. 637.
P. 148, line 22.—*Delete the words* " if she survives."
P. 149, note (*z*).—*Add* : The Common Law rights of her husband have, however, been modified by section 46 of the Administration of Estates Act, 1925.
P. 150, note (*i*).—*Add* : See also *York Glass Co.* v. *Jubb*, 42 T. L. R. 1; 134 L. T. 36.
P. 195, note (*z*).—*For* " Gosman," *read* " Gowan."
P. 217 notes (*r*) and (*t*).—*Add* : See also *Christoforides* v. *Terry*, [1924] A. C. 566; 93 L. J. K. B. 481; 131 L. T. 84; 40 T. L. R. 485.
P. 278, note (*f*).—*Add* : See also *Re Darwen and Pearce*, [1927] 1 Ch. 176; 95 L. J. Ch. 487; 136 L. T. 124.
P. 323 note (*i*).—*For* " Barr," *read* " Bahr."
P. 437, note (*b*).—*Add* : See also, as to this section, *Importers Co., Ltd.* v. *Westminster Bank, Ltd.*, [1927] 1 K. B. 869.
P. 438, note (*f*).—*For* " Monson," *read* " Morison."
P. 500, line 7.—*For* " in common action," *read* " on common action."
P. 513, note (*d*) *ad. fin.*—*For* " Chapter II," *read* " Chapter III."

To face p. 1.

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PRINCIPLES OF THE COMMON LAW.

INTRODUCTION.

Common Law.—In modern times the most familiar idea of "law" is probably that of statute law (*jus scriptum*) created by Act of Parliament. But among peoples whose political development is still in its infancy this idea does not exist. All early law has two characteristics, namely (i) that it consists simply of customary rules (*jus non scriptum*), and (ii) that it is tribal or local and not national. War begets the military chief, who, by conquest or alliance, becomes the permanent king of several tribes and so creates a nation; and with the development of the kingship we find the first notion of statute law in the so-called "laws" of the kings, which are, however, for the most part, either military and administrative rules, or "dooms"; that is to say, formal declarations of existing custom.

In England, at the time of the Norman Conquest, there were, as a result of the numerous previous invasions, many varieties of local law, which had, however, been settled to some extent by the "laws" of different kings, such as the laws of Knut and the laws of Edward the Confessor. Of these local laws the most important were the Mercian law, the Wessex law, and the Dane law. The ordinary jurisdiction was vested in local Courts of differing constitution and powers, but the Witenagemot and the King had the supreme appellate and extraordinary jurisdiction.

After the Conquest the functions of the Witenagemot passed to the *Curia Regis*, a body of royal officials constituting both the King's Council and the King's Court. The local Courts retained their jurisdiction, but the administration of justice was much modified by the use of the *Writ*, by which a defendant could be summoned directly before the King's Court, and by the institu-

tion of *itinerant justices* (*a*), sent down from the *Curia Regis* to sit in the County Court. By these agencies the various local customs were gradually merged into one uniform body of judge-made and royal law, which became the *Common Law* of the kingdom. By the end of the reign of Henry III. the King's Court had become definitely separated from the Council and was divided into the three Courts of King's Bench, Common Pleas, and Exchequer, which, after some intermediate changes, were by the Judicature Act, 1873 (*b*), re-united into one Division of the High Court.

The Chancery.—The supreme fount of justice was the King, who, after the separation of the Courts from the Council, still exercised jurisdiction in his Council which later transmitted most of its powers to the Privy Council. Accordingly when the remedies given by the Courts were inadequate or could not be obtained, a practice arose of seeking relief by a petition addressed to the King in Council. On the hearing of these petitions the Council was presided over by the Chancellor, who, though originally only the chief secretary to the Council, became, in the reign of Edward I., the chief royal minister. Later it became customary to present petitions directly to the Chancellor, and by an ordinance of Edward III. it was decreed that all such matters of "grace" should be determined by the Chancellor, who thus became a judicial officer possessing a power of exercising extra-ordinary interference without any regard to the common law rules. The jurisdiction of the Chancellor was much extended under Richard II., and from the Tudor period the Chancery was a distinct Court with its own procedure and rules.

By the *Judicature Act*, 1873 (*b*), the administration of law and equity was fused into one system and the jurisdiction of the Court of Chancery and the Common Law Courts was transferred to the

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(*a*) The writ was issued from the Chancery, the secretarial department of the Council, and was sealed by the Chancellor, who was the chief secretary. The itinerant justices were not systematically sent out before the reign of Henry I. though they were occasionally commissioned during the two preceding reigns. Henry II. re-organised the system, divided the kingdom into circuits, and commissioned the itinerant justices to take the assizes. Their *Nisi Prius* jurisdiction was created by the Statute of Westminster II. (13 Edw. 1, c. 30).

(*b*) This Act and the subsequent Judicature Acts have been repealed (save for a few provisions) and re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925.

Supreme Court of Judicature, consisting of (i) the *Court of Appeal* and (ii) the *High Court of Justice*, now divided into three *Divisions*, the Chancery Division, the King's Bench Division, and the Probate, Divorce, and Admiralty Division. The distinction between law and equity was not abolished, and the difference between legal and equitable rights and remedies still exists, but law and equity are administered concurrently and every Division of the High Court must take notice of and give effect to all legal and equitable rights, estates, liabilities and defences and can give any relief which before 1873 could be given either by the Court of Chancery or the Common Law Courts (*c*). But in dealing with legal rights, it must regard legal rules, and in dealing with equitable rights and remedies it must regard equitable rules (*d*).

By s. 25 (11) of the *Judicature Act*, 1873 (*e*), it was, however, provided that in any case in which there is any conflict between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail.

Meanings of the term "Common Law."—Both Common Law and Equity have been modified and extended by statute. The term "Common Law" is therefore used to denote (i) the law declared by judgments of the Courts (*jus non scriptum*), as distinct from statute law (*jus scriptum*); (ii) the law administered by the Common Law Courts, whether *jus scriptum* or *jus non scriptum*, as distinct from the rules of Courts of Equity. It is also used to denote the law administered by the Common Law Courts as opposed to the law administered in special Courts, as, for example, the law merchant (*f*).

(*c*) Judicature Act, 1925, ss. 36—44, re-enacting similar provisions of the Judicature Act, 1873.

(*d*) See *Scott* v. *Alvarez*, [1895] 2 Ch. 603; 64 L. J. Ch. 821; 73 L. T. 43; *Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 188; 73 L. J. Ch. 484; 90 L. T. 687.

(*e*) Re-enacted (with the addition of the words "subject to the express provisions of any other Act") by s. 44 of the Judicature Act, 1925.

(*f*) The law merchant passed through three stages. In the first, which ended at the beginning of the seventeenth century, it was a special law administered by special Courts for merchants only. In the second stage, which lasted until the middle of the eighteenth century, it was administered by the Common Law Courts, but it was administered not as law but as a custom applying only if the plaintiff or the defendant was a merchant. During the third stage it has been a collection of customs incorporated into the law and binding upon all persons, whether or not merchants. And it may be extended to include new mercantile customs (*Goodwin* v. *Robarts*, L. R. 10 Ex., at p. 352; 45 L. J. Ex.

Rights and Obligations.—A *right* is a legal capacity, existing in a private individual as such, of controlling the conduct of another private individual, who is under a corresponding *duty* of governing his conduct so as not to infringe that right.

All rights are classified, according to the nature and extent of their correlative duty, as (1) rights *in rem*; (2) rights *in personam*.

1. A right *in rem* is a right availing against *all other persons* and imposing a general and *negative* duty of forbearing from any act infringing it. Such rights are of two classes, namely, (i) rights which exist over definite objects, such as rights of property; (ii) rights which do not exist over any definite object, such as a man's right in his reputation.
2. A right *in personam* is a right availing only against a *definite person*, who is under a *definite duty*, termed an *obligation*, which may be *either* a *negative* duty of forbearance *or* a *positive* duty of acting in some particular way. Obligations may arise in many ways, but the subject of this book is only such obligations as arise from contract, from breach of contract, and from tort.

The distinction between rights *in rem* and rights *in personam* is of great importance and may be illustrated by the following example.

By s. 1 of the Sale of Goods Act, 1893, a "contract of sale of goods" is a "sale" if the property (*i.e.*, the ownership) in the goods is transferred to the buyer, but an "agreement to sell" if the transfer of the property in the goods is to take place at a future time. By a sale a right *in rem* is transferred, but by an agreement to sell only a right *in personam* is created. If, therefore, I have merely agreed to buy goods I acquire only a right *in personam* against the seller; the goods are not my property, although I may have paid for them; they can be taken in execution for his debts; if he becomes bankrupt they will pass to his trustee in bankruptcy; if he sells them to another person I have no rights against the purchaser. But if there has been a

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748; *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658; 67 L. J. Q. B. 986; 79 L. T. 270; 14 T. L. R. 587; *Edelstein* v. *Schuler & Co.* [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 18 T. L. R. 597. See also Scrutton's Mercantile Law, Chapter I.).

sale the goods are mine although I have not paid for them; they cannot be taken in execution for the debts of the vendor and, subject to certain exceptions, they will not pass to his trustee in bankruptcy, and I can recover them from any third person to whom he has transferred them.

Contract and Tort.—Many definitions and classifications that are now used are of comparatively modern growth, so that it is difficult to understand existing law without knowing something of its history. The rules of early English law, as of most early legal systems, relate more to *actions* than to rights, and are concerned more with form than with substance. The historical explanation of this lies in the fact that, originally, an action was not a judicial proceeding, but merely a process by which the injured party might himself obtain satisfaction, *provided that, in so doing, he complied strictly with all the customary formalities.* By gradual stages the legal procedure of a modern action was substituted for this process of self-help (*g*), but for a very long time the form of the procedure was governed by rules derived from the older processes, so that a mistake in any step caused the action to fail.

Classification of actions.—In English law actions were classified, according to the nature of the remedy, as real, personal, and mixed. Real actions were those brought for the recovery of freeholds, personal actions were those brought to recover a debt or damages, and mixed actions were those in which both kinds of relief were claimed (*h*).

From the date of the Restoration personal actions have been divided into two classes, those founded on contract and those

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(*g*) In a few cases, however, self-help is still permissible, as, *e.g.*, in distress, abatement of a nuisance, expulsion of a trespasser and retaking of goods by the lawful possessor.

(*h*) Only the possession of a freehold was fully protected by the Common Law, If a freeholder was dispossessed he could recover possession of his holding, and this right was later extended to a tenant for years. But except where replevin lay, which will be explained later, a dispossessed owner of goods who sought to recover them by action was bound to put a money value upon them, on payment of which the defendant was absolved. Since 1854, however, the Court has had power to order execution to issue for the specific delivery of chattels. See, now, Rules of the Supreme Court, Order XLII., r. 6; Order XLVIII., r. 1; County Court Rules, Order XXV., r. 69; *Hymas* v. *Ogden* [1905] 1 K. B. 246; 74 L. J. K. B. 101.

founded on tort (*i*). But the clear line which we are accustomed at this day to draw between contract and tort in the classification of personal actions does not correspond with the early English law, nor with the history of old English writs and causes of action (*k*).

Conditions for the Maintenance of an Action.—An injured person had formerly no remedy unless he could bring his grievance within the exact words of an existing form of writ. The number of writs, originally very small, was increased by the *Statute of Westminster II.* (*l*), which provided that "as often as it shall happen in Chancery that in one case a writ is found, and in a like case falling under the same right and requiring like remedy no writ is found, the clerks in Chancery shall agree in making a writ." These writs in *consimili casu* produced the class of actions known as "actions on the case," which, however, since they could be framed only on the analogy of the older writs, were limited in number and, in their turn, became settled in form. A plaintiff might therefore still fail either because there was no writ which met his case or because he had chosen the wrong form of writ, even though, in the latter case, he would have succeeded if he had chosen a different form.

All this system, after some modifications by the *Common Law Procedure Acts*, 1852—1856, was finally swept away by the *Judicature Acts*, 1873 and 1875, and the *Rules of Court* made under these Acts, which, in effect, abolished forms of action. An action in the High Court is now commenced by a *writ of summons*, indorsed by the plaintiff or his solicitor with a statement, which need not be in formal language, of the nature of his claim or the relief or remedy which he requires (*m*). The writ of summons is then followed by a *statement of claim*, which, without specifying any particular form of action, sets out merely the material *facts* on which the plaintiff relies (*n*). And the

(*i*) *Sinclair* v. *Brougham* [1914] A. C., at p. 415; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315.

(*k*) *Finlay* v. *Chirney*, 20 Q. B. D., at p. 503; 57 L. J. Q. B. 247; 58 L. T. 664.

(*l*) 13 Edw. 1, c. 24.

(*m*) Order II., r. 1. In some cases an action can be commenced by an *originating* summons.

(*n*) Order XIX., r. 4.

plaintiff will succeed if he establishes facts which, under any form of action, would have entitled him to the relief or remedy claimed.

But the principles upon which the existence of a cause of action depends must still be applied. Of these the most important are:

1. That no action lies for *damnum absque injuria*, though
2. An action lies in some cases for *injuria sine damno*.

1. *Damnum absque injuria.*—The mere fact that a person has suffered injury or pecuniary damage (*damnum*) does not entitle him to maintain an action unless it has been occasioned by an act which is a *legal* injury (*injuria*), that is to say, is a violation of his legal rights. "If a man sustains damage by the wrongful act of another he is entitled to a remedy . . . that he has sustained damage is not of itself sufficient" (*o*). "There is no such thing as a wrong without presupposing a right which is violated" (*p*).

Thus every person may deal with the soil of his own land as he thinks fit, even though he causes damage to his neighbours, unless his acts infringe any of their legal rights. Several instances of this principle have occurred in relation to the use of water. When water flows in a defined channel, whether above or below ground, every owner of the land through which it flows has an equal right to its enjoyment and no one owner may make use of the water in such a way as to infringe the rights of the others (*q*). But when water flows over, or percolates under, land in no defined course or channel, the owner of the land may apply it to his own purposes as he thinks fit, and may even entirely prevent it from percolating through to the land of his neighbour, who, although he may thereby suffer great damage, has no cause of action, because he has no legal right to the enjoyment of water which may come to him otherwise than in a definite channel (*r*).

(*o*) *R.* v. *Pagham*, 8 B. & C., at p. 362; 6 L. J. (o.s.) K. B. 338; 32 R. R. 406.

(*p*) *Baird* v. *Williamson*, 15 C. B. (N.S.), at p. 388; 33 L. J. C. P. 101; 137 R. R. 561.

(*q*) *Embrey* v. *Owen*, 6 Ex. 353; 20 L. J. Ex. 212.

(*r*) *Acton* v. *Blundell*, 12 M. & W. 324; 13 L. J. Ex. 289; 67 R. R. 361. *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 115 R. R. 187 (abstraction of percolating water which fed the plaintiff's mill stream); *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; 38 L. J. Ex. 126 (abstraction causing subsidence of a neighbour's land). And where the defendant has a legal right

A further illustration is supplied by the case of *Allen* v. *Flood* (*s*). There a shipbuilding firm employed the plaintiffs as shipwrights. Ironworkers employed on the same ship objected to the employment of the plaintiffs on the ground that they had, when working for another employer, infringed certain trade union rules. One of the ironworkers accordingly telegraphed to the defendant, who was an official of the ironworkers' union. The defendant on his arrival discovered that the ironworkers were likely to strike unless the plaintiffs were discharged and communicated this information to the employers, who therefore, at the end of the day, discharged the plaintiffs and refused to employ them again. The plaintiffs sued the defendant for damages, but it was held that there was no cause of action. The defendant had not induced the employers to commit any actionable wrong, but merely to do what was within their legal rights; they had committed no breach of contract, because the employment was day by day and terminated at the end of each day. Nor had the defendant procured his object by any illegal means, such as threats (*t*), intimidation or misrepresentation. Accordingly, since his act did not amount to a legal injury, it was not actionable although it had caused damage to the plaintiffs, who otherwise would have retained their employment, and although it was done, as the jury found, from a malicious motive. There was therefore *damnum absque injuria*.

2. *Injuria sine damno*.—On the other hand, whenever there is an invasion of a legal right, the person whose right has been infringed has a cause of action and may recover at least nominal damages although he has suffered no actual injury or damage. This is illustrated by the case of *Ashby* v. *White* (*u*), in which

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to abstract the water, the fact that he does so with the object of injuring his neighbour does not create a cause of action (*Bradford Corporation* v. *Pickles*, [1895] A. C. 587; 64 L. J. Ch. 757; 73 L. T. 353).

(*s*) [1898] A. C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; explained and distinguished in *Quinn* v. *Leathem*, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289.

(*t*) In the opinion of the majority of the House of Lords the defendant did not *threaten* to call out the ironworkers, but merely informed the employers that they would knock off work if the plaintiffs were employed (see *Quinn* v. *Leathem* [1901] A. C., at p. 532; 70 L. J. P. C. 76).

(*u*) 2 Ld. Raym. 938; 3 Ld. Raym. 320. "An injury imports a damage, when a man is thereby hindered of his right."

the plaintiff brought an action against a returning officer for maliciously refusing to receive his vote on an election of burgesses to serve in Parliament, and it was held that the defendant having so maliciously refused to receive the plaintiff's vote, although the members for whom he wished to vote were actually elected, and therefore he suffered no damage, yet he had a good right of action, for he had a legal right to vote, and that right had been infringed.

But, in dealing with this maxim, it must be remembered that in some *torts* there is in fact no *injuria* in the absence of some actual injury or damages. Every breach of contract is an *injuria*, for which nominal damages may be claimed (*x*), but torts, as will be explained later, are of two classes (*y*). In one class, as in the case of an ordinary trespass to land or an obstruction of a right of common or a right of way, any infringement of the plaintiff's right is a sufficient cause of action although no actual damage may have resulted (*z*). In the other class, as, for example, in actions for negligence and ordinary cases of slander, there is no cause of action unless the plaintiff has actually suffered some injury or damage.

Survival of Causes of Action.—*Actio personalis moritur cum persona.*—Although a person may have suffered a legal injury, there are many cases in which, if he dies before he has enforced his rights, the cause of action expires with him, the Common Law principle being that a personal action dies with the person. And, on the same principle, there are many cases in which the death of the person who has committed an injury deprives the injured party of the remedy which he would otherwise have had.

The principle was formerly applied to all personal actions, but is now very much limited in its scope, a distinction having been drawn between actions for compensation for personal wrongs and

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(*x*) *Marzetti* v. *Williams*, 1 B. & Ad. 415; 9 L. J. (o.s.) K. B. 42; 35 R. R. 329. But a plaintiff who recovers only nominal damages may be deprived of costs; *id.*, at p. 425.

(*y*) See *Neville* v. *London Express Newspaper, Ltd.* [1919] A. C., at pp. 379, 392; 88 L. J. K. B. 282; 120 L. T. 299; 35 T. L. R. 167.

(*z*) *Williams* v. *Morland*, 2 B. & C., at p. 916; 2 L. J. (o.s.) K. B. 191; 26 R. R. 579.

actions in respect of wrongs causing pecuniary loss or injury to property (*a*).

1. *Actions by personal representatives.*—At Common Law a right of action for *breach of contract* survives to the personal representatives of a deceased person unless the claim is for damages which would have been given to him in his lifetime only as compensation for a personal wrong. Thus, the right to bring an action for breach of promise to marry the deceased will not survive to the personal representatives unless the deceased thereby suffered some pecuniary loss or damage (*b*). By s. 26 (1) of the *Administration of Estates Act*, 1925, it is now provided that for any debt (including arrears of rent) due to a deceased person his personal representatives shall have the same right of action as the deceased would have had if alive.

No right of action for *tort* survives at Common Law, but

i. By s. 26 (1) of the *Administration of Estates Act*, 1925, re-enacting 4 Edw. 3, c. 7, as amended by 25 Edw. 3, st. 5, c. 5, personal representatives have a right of action for damage to the *personal estate* of the deceased during his life (*c*).

ii. By s. 26 (2) of the *Administration of Estates Act*, 1925, re-enacting s. 2 of the Civil Procedure Act, 1833, personal representatives have a right of action for injuries committed to the *real estate* of the deceased within six months before his death provided that the action is brought within one year after the death: any damages recovered in such action form part of the personal estate of the deceased.

(*a*) See *Quirk* v. *Thomas*, [1916] 1 K. B., at p. 531; 85 L. J. K. B. 519; 114 L. T. 308; 32 T. L. R. 197.

(*b*) *Chamberlain* v. *Williamson*, 2 M. & S. 408; 15 R. R. 295.

(*c*) "These [earlier] statutes have been construed very liberally: they have been held to apply to all torts except those relating to the [deceased person's] freehold and those where the injury done is of a personal nature" (*Twycross* v. *Grant*, 4 C. P. D., at p. 45; 48 L. J. C. P. 1. In this case it was held that an action brought to recover from the promoters of a company the price paid for valueless shares, on the ground of fraudulent omissions in the prospectus, survived to the personal representatives of the plaintiff). See also *Hatchard* v. *Mège*, 18 Q. B. D. 77; 56 L. J. Q. B. 397; 56 L. T. 662, where an action was held not to survive to the personal representative in so far as it related to a claim in respect of a personal libel, but to survive in so far as it related to a claim in respect of slander of title to a trade mark: cf. *Oakey* v. *Dalton*, 35 Ch. D. 700; 56 L. J. Ch. 823.

iii. By various statutes (*d*) personal representatives may maintain an action for damages in respect of the death of the deceased.

2. *Actions against personal representatives.*—A right of action for *breach of contract* survives in general against the personal representatives whether the injury caused thereby was a personal injury or an injury to property (*e*). An exception, however, exists in case of actions for breach of promise of marriage, which, if they can survive at all against personal representatives (*f*), can do so only where the plaintiff has suffered some special damage (*g*). A cause of action in *tort* does not generally survive against the personal representatives, but may do so in two cases, namely—

i. Where the deceased has in his lifetime appropriated property or the value or proceeds of property belonging to the plaintiff (*h*).

ii. Where the deceased has committed any wrong to the real or personal property of the plaintiff within six calendar months before his death (*i*). In such a case,

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(*d*) The Fatal Accidents Acts (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95; 8 Edw. 7, c. 7), the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1925.

(*e*) *Quirk* v. *Thomas*, [1916] 1 K. B., at p. 531; 85 L. J. K. B. 519.

(*f*) This was doubted by Swinfen Eady, L.J., in the case of *Quirk* v. *Thomas (ubi supra)*.

(*g*) *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664.

(*h*) *Phillips* v. *Homfray*, 24 Ch. D. 439; 52 L. J. Ch. 833; *Brocklebank, Ltd.* v. *The King*, [1925] 1 K. B., at p. 68; 94 L. J. K. B. 26; 132 L. T. 166; 40 T. L. R. 869.

(*i*) Under the Act of 1833 the personal representatives could not be sued for injuries done more than six months before the death, although the action was commenced against the deceased in his lifetime (*Kirk* v. *Todd*, 21 Ch. D. 484; 52 L. J. Ch. 224; 47 L. T. 676). In the case of a continuing wrong, such as obstruction to ancient lights, it was held the cause of action accrued *de die in diem* up to the date of the death, and the action was maintainable although the obstruction was completed more than six months before the death, though damages were recoverable only in respect of the injury caused for six months before the death (*Woodhouse* v. *Walker*, 5 Q. B. D. 404; 49 L. J. Q. B. 609; 42 L. T. 470; followed in *Jenks* v. *Clifden*, [1897] 1 Ch. 694; 66 L. J. Ch. 338; 76 L. T. 382).

It has recently been held that the limitation of time imposed by s. 2 of the Civil Procedure Act, 1833, which related only to actions of trespass or trespass on the case, did not apply to an action by remaindermen against the executors of a deceased tenant for life in respect of damage to the estate during his lifetime by reason of his failure to fulfil his obligation to repair, such an action not being based on tort but on the equitable principle that a person who takes a benefit will be compelled by a Court of Equity to fulfil

by s. 26 (5) of the *Administration of Estates Act*, 1925, re-enacting, with some modifications, s. 2 of the Civil Procedure Act, 1833, an action may be brought against the personal representatives within six months after they have taken out representation: any damages recovered are payable as a simple contract debt incurred by the deceased.

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the condition upon which he took it (*Jay* v. *Jay*, [1924] 1 K. B. 826; 93 L. J. K. B. 280; 130 L. T. 697).

PART I.

CONTRACTS.

CHAPTER I.

Section 1.—*The Different Kinds of Contracts.*

Contracts are usually divided into three classes, viz.:

1. Contracts of record, *i.e.*, judgments and recognisances.
2. Contracts under seal, or specialties.
3. Simple contracts, *i.e.*, those not included in the foregoing and made either by writing not under seal or by mere word of mouth or by conduct.

Contracts may also be divided according to the manner of their formation into—

1. Express contracts, *i.e.*, those whose terms were expressed in some written document or by the words of the parties.
2. Inferred contracts, *i.e.*, contracts which may as a matter of *fact* be inferred from the conduct of the parties.
3. Implied contracts, *i.e.*, contracts which the *law* implies, independently of any express or inferred agreement by the parties (*a*).

They may also be divided, with reference to their performance, into—

1. Executed contracts, *i.e.*, those in which one party has wholly performed his part.
2. Executory contracts, *i.e.*, those which are entirely unperformed or in which something remains to be done by both parties.

The elements of a contract.—The essential elements of all contracts, other than contracts of record are (i) an *agreement*

(*a*) As to inferred and implied contracts, see further *post*, p. 46.

or promise, which (ii) creates an *obligation* (*b*). In most cases a contract is the result of an agreement, but a mere promise, if under seal, can also create an obligation of a contractual nature. In order to create an obligation an agreement or promise must have the following characteristics:—

1. It must be either under seal or made for valuable consideration.
2. It must comply with any legal requirements as to its form. Most contracts are not subject to any such requirements, but some, on the other hand, must be in a particular form, *i.e.*, under seal, or in writing, or in a special kind of written instrument.
3. It must be made by a party who is legally capable of binding himself by such an agreement or promise.
4. It must not be unlawful.
5. It must be "capable of being reduced to such certainty as to form matter of legal obligation" (*c*). Thus, A bought a horse from B and paid £63, promising also that if the horse proved lucky he would either pay £5 more or buy another horse. It was held that this promise was too vague to be enforced (*d*). So also an agreement to retire from a business "so far as the law allows" has been held too vague for the Court to enforce (*e*). So also an unintelligible agreement with respect to the payment of interest on a loan has been held to be void (*f*).
6. It must be concerned with *legal* rights and duties and must be intended to produce *legal* consequences (*g*). Accordingly agreements relating to a mere social engagement, such as "where two parties agree to take a walk together or where there is an offer or accept-

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(*b*) A contract may also have other effects. Thus by s. 1 of the Sale of Goods Act, 1893, "a contract of sale of goods is a contract whereby the seller *transfers* or agrees to transfer the property in goods to the buyer (see *ante*, p. 4).

(*c*) *Guthing* v. *Lynn*, 2 B. & Ad. 232; 9 L. J. K. B. 181.

(*d*) *Id.*

(*e*) *Davies* v. *Davies*, 36 Ch. D. 359; 56 L. J. Ch. 962; 58 L. T. 209.

(*f*) *Re Vince*, [1892] 2 Q. B. 478; 61 L. J. Q. B. 836; 67 L. T. 70.

(*g*) *Foster* v. *Wheeler*, 36 Ch. D., at p. 698; 57 L. J. Ch. 871.

ance of hospitality . . . are not contracts because the parties did not intend that they should be attended by legal consequences " (*h*). On this principle it has been held that a mere domestic arrangement made between husband and wife for the payment of an allowance to the wife did not create a contract which could be enforced by the Court (*i*). On the other hand, " in the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow " (*k*). Even such an agreement may not, however, amount to a contract if the parties expressly provide that it is not to be a legal agreement nor legally enforceable (*l*).

History.—The principles which now govern the law of contract are of comparatively modern growth. Their history is outside the scope of this book, but it is necessary to state shortly the steps by which simple executory contracts became binding.

In early English law there was no general conception of contract; there was merely a limited number of actions based on causes of action which we now class as contractual: of these, the most important were the actions of covenant and of debt.

A promise made by *deed* could be enforced by an action of covenant, or, if it was a promise to pay money, by an action of debt. In the case of a deed the promise was binding solely on account of the *form* in which it was expressed, the deed being an act (*factum*) which the defendant was estopped from denying and which was therefore conclusive evidence of his promise. The action of debt lay also for a liquidated sum of money due by the defendant on an informal contract which had been executed by the plaintiff, as, *e.g.*, money due for goods sold and delivered or work done. Here, again, the cause of action was not grounded on agreement, but on the benefit or *quid pro quo* received by the

(*h*) *Balfour* v. *Balfour*, [1919] 2 K. B., at pp. 578, 579; 88 L. J. K. B. 1054; 121 L. T. 346; 35 T. L. R. 609.

(*i*) *Balfour* v. *Balfour* (*ubi supra*). It must, however, be noticed that the decision was merely that the particular agreement was not a contract. It was pointed out by the Court that the parties might have made a similar agreement which would have been a contract but that in fact they had not intended to do so.

(*k*) *Rose & Frank & Co.* v. *Crompton & Brothers*, [1923] 2 K. B., at p. 282; 92 L. J. K. B. 959.

(*l*) *Id.*, [1925] A. C. 445; 94 L. J. K. B. 120; 132 L. T. 641.

defendant, in return for which he had promised—or must be taken to have promised—to pay the sum sued for.

No form of action originally lay for an *executory* contract not under seal. This deficiency was, however, supplied by the use of the action of *assumpsit*, which, it was finally settled, would lie for breach of an informal promise, provided that some consideration had been given by the plaintiff to the person making the promise.

The action of *assumpsit* was derived from the law of *tort* in the following manner. Where an injury was caused by *direct* interference with the plaintiff's person or property an action of *trespass* lay; but if the injury was caused indirectly by a wrongful act of the defendant, the remedy was an action of "case" or "trespass on the case" (*m*). Thus, if A threw a log and hit B, the action was trespass, but if A threw a log into the highway so that B was injured by falling over it, the action was case. An action of case also lay when damage was caused by conduct which, though not in itself unlawful, was a violation of some special duty owed by the defendant to the plaintiff. In this application a special form, known as the action of *assumpsit*, lay for damages caused to the plaintiff by the negligent performance or non-performance of something which the defendant had undertaken to perform and *of which he had actually commenced the performance*. This was still an action of tort, the ground on which it was based being that, when the defendant actually assumed (*assumpsit*) the performance of the work, a relationship was established between the parties which operated to the detriment of the plaintiff by exposing him to risk, and therefore imposed upon the defendant a special duty rendering him liable for any damage caused by his negligent or incomplete performance.

Later, the meaning of the term *assumpsit* was extended to cover not only the actual assumption of the work, but an "undertaking" in the sense of a promise, and the action was made applicable to cases of pure *non-feasance, i.e.*, where the defendant, after undertaking to do something, had done nothing in execution of his promise. In this application it became an action of con-

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(*m*) *Ante*, p. 6.

tract, the ground of liability being the promise and not the actual assumption of the work (*n*). In this class of cases, however, it became subject to the rule (borrowed from the action of debt) that it lay only when the defendant had received from the plaintiff some advantage or *quid pro quo*. Finally it was settled that an action of *assumpsit* would lie for the breach of an informal executory contract whenever some *consideration* had moved from the plaintiff (the promisee) to the defendant (the promisor), and that the consideration might consist either of a detriment to the plaintiff or an advantage to the defendant. It was also extended to implied, and even fictitious, promises, and, owing to the greater advantage which its procedure gave to the plaintiff, it superseded the action of debt (*o*).

Section 2.—*Contracts of Record.*

The term "contract of record" is applied to (i) judgments of English Courts of Record and (ii) recognisances taken in such Courts.

A Court of Record is a Court of which the proceedings are enrolled or recorded and whose records are indisputable evidence of its proceedings (*p*). The essential characteristic of a Court of Record is the power to fine or imprison, and every Court to which such power belongs, either at Common Law or by statute, is thereby constituted a Court of Record (*q*). The High Court of Justice and the Court of Appeal (*r*), the Court of Criminal Appeal (*s*), the Privy Council (*t*), and the House of Lords (*u*) are superior Courts of Record. The County Courts (*x*), the Courts

(*n*) See *Corbet* v. *Packington*, 6 B. & C. 268; 5 L. J. (o.s.) K. B. 142.

(*o*) See *Sinclair* v. *Brougham*, [1914] A. C., at p. 417; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315.

(*p*) Black. Comm. ii. 465; iii. 24.

(*q*) *Groenvelt* v. *Burwell*, 1 Ld. Raym. 454; *Kemp* v. *Neville*, 10 C. B. (N.S.), at p. 552; 31 L. J. Ch. 158; 128 R. R. 815.

(*r*) Judicature Act, 1873, ss. 16, 18; Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18, 26.

(*s*) Criminal Appeal Act, 1907, s. 1 (7).

(*t*) The Privy Council is the descendant of the King's Council, from which it derives its powers, now exercised by a Judicial Committee constituted in 1833.

(*u*) The appellate jurisdiction of the House of Lords dates from the 13th century and arose out of the exercise by the Lords of judicial functions of the King in Council in Parliament.

(*x*) County Courts Act, 1846, s. 3; 1888, s. 5.

of Quarter Sessions (*y*), the Coroner's Court (*z*), and numerous local Courts established by prescription, charter or statute, are inferior Courts of Record (*a*).

Judgments.—A judgment does not fall within the modern idea of a "contract," since the obligation which it creates does not arise from any promise or agreement but is imposed by the order of the Court. But it has long been a settled rule of English law that the judgment of a Court of Record, ordering a sum of money to be paid, creates a *debt of record* for which an action is maintainable. The principle upon which this rule depends is that where a Court of competent jurisdiction adjudges a sum to be paid, an obligation to pay it is thereby created, and an action of debt, which is an action of contract, may therefore be brought upon the judgment: this principle is applicable not only to English Courts of Record but to English Courts which are not Courts of Record and to foreign and colonial Courts, but the judgments of all Courts other than English Courts of Record create only simple contract debts (*b*).

Although, however, an action can be brought upon a judgment, yet, in practice, this course is, as a rule, unnecessary and improper because it can at once be enforced by the superior

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(*y*) *R.* v. *Clement*, 4 B. & Ad., at p. 233; 23 R. R. 260.

(*z*) *Thomas* v. *Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139; 6 L. T. 320; 127 R. R. 443.

(*a*) Convictions on summary proceedings before justices are also matter of record (*Basten* v. *Carew*, 3 B. & C. 649; 3 L. J. K. B. 111; 27 R. R. 453; see also Paley on Summary Convictions, pp. 437, 438). Note that inferior Courts of Record can commit only for contempt *in facie curiæ*: see *R.* v. *Lefroy*, L. R. 8 Q. B. 134; 42 L. J. Q. B. 121; 28 L. T. 132; and as to County Courts, see also the County Court Act, 1888, s. 162.

(*b*) *Williams* v. *Jones*, 13 M. & W. 628; 14 L. J. Ex. 145; 67 R. R. 767; *Smith* v. *Nicolls*, 5 Bing. N. C. 208; 8 L. J. C. P. 92; 50 R. R. 658. The judgments of foreign Courts, so far as concerns their enforcement in this country, and their effect as a bar to subsequent proceedings (*post*, p. 23), or as an estoppel (*post*, p. 24), see also Part IV.) are governed by substantially the same rules as English judgments, provided that the foreign Court had jurisdiction over the subject-matter and the parties, and that the judgment was final and conclusive between the parties and is not impeachable on the ground of fraud or because the proceedings were contrary to natural justice. See *Castrique* v. *Imrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350; 23 L. T. 48; *Messina* v. *Petrococchino*, L. R. 4 P. C. 144; 41 L. J. P. C. 27; 26 L. T. 661; *Rousillon* v. *Rousillon*, 14 Ch. D. 351; 49 L. J. Ch. 339; 42 L. T. 679; *Re Trufort*, 36 Ch. D. 600; 57 L. J. Ch. 135; 62 L. T. 189; *Nouvion* v. *Freeman*, 15 A. C. 1; 59 L. J. Ch. 337; 62 L. T. 189; *Pemberton* v. *Hughes*, [1899] 1 Ch. 781; 68 L. J. Ch. 281; 80 L. T. 369; 15 T. L. R. 211; *Harris* v. *Taylor*, [1915] 2 K. B. 580; 84 L. J. K. B. 1839; 113 L. T. 221.

remedy of execution (*c*). Moreover, no action can be brought in the County Court upon a High Court judgment (*d*), nor in the High Court upon a County Court order or judgment other than an order made in bankruptcy (*e*).

The right of action upon a judgment is barred after twelve years (*f*).

Recognisances.—A recognisance is an obligation entered into before a Court or official duly authorised, by a person who is thereby bound to some act. Recognisances are used for many purposes, as, *e.g.*, in criminal matters, to bind a person convicted of an offence to come up for judgment when called upon, or to bind a person admitted to bail to appear for trial at a time and place specified (*g*), and, in the Chancery Division, to bind a receiver appointed by the Court to account for all sums received by him (*h*). In form, a recognisance is an acknowledgment of a debt to the King or to some other specified person, with a condition that if the person entering into the recognisance, termed the recognisor, does the act thereby required, the recognisance shall be void. A recognisance enrolled in a Court of Record constitutes a debt of record (*i*), enforceable, usually, by distress, and, sometimes, by action (*k*).

(*c*) *Pritchett* v. *English and Colonial Syndicate*, [1899] 2 Q. B., at p. 435; 68 L. J. Q. B. 801; 81 L. T. 206. For an exceptional case in which an action upon a judgment was more advantageous than execution, see *Shaw* v. *Allen*, 30 T. L. R. 361. Scottish judgments and judgments of the Courts of Northern Ireland (see *Wakely* v. *Triumph Cycle Co.*, [1924] 1 K. B. 214; 93 L. J. K. B. 331; 130 L. T. 269; 40 T. L. R. 15) may be registered and enforced by execution in England (Judgments Extension Act, 1868, ss. 1—3). Provision may also be made by order in Council under s. 9 of the Administration of Justice Act, 1920, for the registration and enforcement of judgments of the overseas Dominions.

(*d*) County Courts Act, 1888, s. 63.

(*e*) *Id.*, s. 151; and see *Savill* v. *Dalton*, [1915] 3 K. B. 174; 84 L. J. K. B. 1583; 113 L. T. 477. A County Court has for the purposes of its bankruptcy jurisdiction all the powers of the High Court.

(*f*) *Post*, Part I., Chapter 6, section 2.

(*g*) See Harris' Criminal Law, pp. 423—425; 494—496.

(*h*) See *Re Graham*, [1895] 1 Ch. 66; 64 L. J. Ch. 98; 71 L. T. 623; *Seagram* v. *Tuck*, 18 Ch. D. 296; 50 L. J. Ch. 572; 44 L. T. 800.

(*i*) *Re Nottingham Corporation*, [1897] 2 Q. B., at p. 513; 66 L. J. Q. B. 883; 77 L. T. 210. The following is a short form of recognisance :—

Recognisance to appear at Assizes.

Be it remembered that on the —— day of —— 1927 [*insert names and descriptions of defendant and bail*] come before me —— one of His Majesty's

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(*k*) See note (*k*), p. 20.

Principal Characteristics of Contracts of Record.

1. They prove themselves; which means that when it is necessary to prove a contract of record the mere production thereof is sufficient proof, and is, moreover, the proper mode of proof, so that, when the existence of the record is disputed, the record itself must be produced: but in other cases it may, as a rule, be proved by an office copy or examined copy (*l*).

2. The record, while it stands, is conclusive evidence of the matters recorded and admits of no "averment, plea, or proof to the contrary" (*m*). But a person against whom a record is set up may plead *nul tiel record*, *i.e.*, may deny the existence of the alleged record (*n*).

3. The doctrine of consideration is not applicable to them. The reason for this is apparent from the short account which has already been given of the origin of the doctrine of consideration.

In bankruptcy proceedings, however, though a judgment is *prima facie* evidence of a debt, the Court, which moreover is not estopped by the judgment (*o*), may in two cases enquire into the consideration for a judgment. Firstly, on the hearing of a petition by a judgment creditor for a receiving order, the Court may

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Justices of the Peace in and for the county of ——, and acknowlédge to owe Our Sovereign Lord the King the several sums following (that is to say): The said —— the sum of —— pounds, and the said —— the sum of —— pounds, and the said —— the sum of —— pounds each, to be levied upon their several goods and chattels, lands and tenements, to His Majesty's use, upon condition that if the said [*defendant*] shall personally appear at the next assizes and session of oyer and terminer and general gaol delivery, to be holden in and for the county of ——, and then and there answer to all such matters and things as on His Majesty's behalf shall then and there be objected against him, and so from day to day, and not depart that Court without leave, then this recognisance to be void, or else to remain in full force.

Taken and acknowledged the day
and year first aforesaid.

Before me
[*Signed*, etc.]

(*k*) The enforcement of recognisances is governed by various statutes and rules which are outside the scope of this book. The right of action is usually barred in twenty years (*post*, Part I., Chapter 6, section 2): see, however, *Seagram* v. *Tuck* (*ubi supra*).

(*l*) See *further*, *post*, Part IV.

(*m*) Co. Inst. 1, 260; *R.* v. *Carlile*, 2 B. & Ad. 362; 9 L. J. K. B. 250; *Basten* v. *Carew*, 3 B. & C. 649; 3 L. J. K. B. 111; 27 R. R. 453; *Kemp* v. *Neville*, 10 C. B. (N.S.) 523; 31 L. J. C. P. 158; 128 R. R. 815. See also *post*, Part IV.

(*n*) See Bullen & Leake (3rd ed.), p. 621, and *R.* v. *Carlile* (*ubi supra*).

(*o*) *Ex p. Lennox*, 16 Q. B. D., at p. 323; 55 L. J. Q. B. 45; 54 L. T. 452.

enquire into the consideration, in order to determine whether there was a real debt in respect of which a judgment ought to have been obtained (*p*), or of such a kind that a receiving order ought to be made (*q*). Secondly, at the instance of the trustee in bankruptcy, the Court may, upon the question of the proof of a judgment debt, enquire into the consideration therefor, in order to prevent the right of *bona fide* creditors to an equal distribution of the assets from being prejudiced by a judgment obtained by fraud or collusion (*r*), or for a debt which could not be proved in the bankruptcy as, for example, a gambling debt (*s*).

4. By s. 195 of the Law of Property Act, 1925, replacing earlier enactments of similar effect, a judgment entered up in the Supreme Court (whether before or after the commencement of the Act), and a recognisance, on behalf of the Crown or otherwise (whether entered into before or after the commencement of the Act), operates, *as soon as a writ or order for enforcing it is registered at the Land Registry*, as an equitable charge on any interest in land (including the unpaid purchase-money for land) to which the judgment debtor or the person bound by the recognisance is entitled (*t*).

5. A judgment creates a *merger* of the obligation on which it is founded. A contract of record is of a higher nature than a specialty contract which, in turn, is of a higher nature than a simple contract. And it is a general rule of law that a person who takes or acquires a security, remedy or cause of action of a higher nature than one which he already possesses in respect of the same subject-matter, thereby merges and extinguishes his existing security, remedy or cause of action (*u*). Accordingly, if a bond or covenant under seal is given for a simple contract

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(*p*) *Ex p. Kibble, re Onslow*, L. R. 10 Ch. 373; 44 L. J. Bk. 63; 32 L. T. 138; *Ex p. Lennox*, 16 Q. B. D. 315; 55 L. J. Q. B. 45; 54 L. T. 452. See also *Re A Debtor* [1903] 1 K. B. 705; 72 L. J. K. B. 383.

(*q*) By s. 5 (3) of the Bankruptcy Act, 1914, "if the Court is not satisfied with the proof of the petitioning creditor's debt . . . or is satisfied . . . that *for other sufficient cause no order ought to be made*, the Court may dismiss the petition."

(*r*) *Ex p. Lennox* (*ubi supra*).

(*s*) *Ex p. Seaton, re Deerhurst*, 60 L. J. Q. B. 411; 64 L. T. 273. See also *Ex p. Anderson, re Tollemache*, 14 Q. B. D. 606; 54 L. J. Q. B. 383.

(*t*) See Williams' Real Property, 24th ed., pp. 320—324.

(*u*) See *Owen* v. *Homan*, 3 Mac. & G., at p. 407; 20 L. J. Ch. 314; 94 R. R. 516.

debt, the simple contract is merged in the higher security; and, if judgment is recovered for a simple contract or specialty contract, the original cause of action is merged in the judgment (*x*). Thus, where a mortgage deed contained a covenant by the mortgagor to pay the principal sum at a fixed date with interest at 5 per cent. per annum, and a further covenant to pay interest at 5 per cent. per annum upon so much of the principal as should remain unpaid after that date, and the mortgagee sued for the mortgage money and obtained judgment, it was held that the covenant to pay interest after the date for repayment of the principal merged in the judgment, and that, on the bankruptcy of the mortgagor, the mortgagee was, as from the date of the judgment, entitled only to prove for interest on the judgment debt at 4 per cent., and not to the 5 per cent. under the judgment (*y*).

The doctrine of merger by judgment applies not only to debts but to any breach of contract, wrong, or other cause of action, the principle being that the cause of action is changed into matter of record and the previous remedies merge into the higher remedy of execution available under the judgment (*z*).

The doctrine, however, applies only to English Courts of Record: the judgment of a foreign Court, or of an English Court which is not a Court of Record, creates merely a simple contract

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(*x*) Bullen & Leake, (3rd ed.), pp. 624, 651.

(*y*) *Ex p. Fewings, re Sneyd*, 25 Ch. D. 338; 53 L. J. Ch. 545; 50 L. T. 109. But "A covenant to pay interest may be so expressed as not to merge in a judgment for the principal"; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment (25 Ch. D., at p. 355). Moreover, it is only the personal remedy that is merged in the judgment; if, therefore, the proviso for redemption is on payment of the principal and interest at 5 per cent., the fact that the right to sue upon the covenant to pay 5 per cent. interest on unpaid principal has been changed into a right under a judgment bearing interest at 4 per cent. does not affect the right of the mortgagee to hold his security until payment of the full amount in the proviso for redemption: accordingly, notwithstanding that judgment may have been recovered in an action for the debt, the mortgagor can only redeem by paying the principal and interest at 5 per cent. (*Economic Life Assurance Co.* v. *Usborne*, [1902] A. C. 147; 71 L. J. P. C. 34).

(*z*) *Smith* v. *Nicolls*, 5 Bing. N. C. 208; 8 L. J. C. P. 92; 50 R. R. 658; *King* v. *Hoare*, 13 M. & W., at p. 504; 14 L. J. Ex. 29; 67 R. R. 694; and as to torts, see *Buckland* v. *Johnson*, 15 C. B. 145; 23 L. J. C. P. 204; 100 R. R. 280.

debt, and the plaintiff may sue either upon the original contract or upon the judgment unless it is satisfied (*a*).

The effect of a judgment as a bar to further proceedings. Res judicata. Estoppel.—Since the effect of merger is to destroy the original cause of action, the defendant, if sued again by the same plaintiff upon the same cause of action, may set up the defence of *res judicata* as a bar to the second action. But, independently of merger, it is a principle of law that "*Nemo debet bis vexari pro eadem causa.*" Accordingly the defence of *res judicata* is not limited to judgments of English Courts of Record (*b*), nor to cases in which merger has occurred, but applies to any final (*c*) decision of any tribunal of competent jurisdiction whether English or (subject to certain qualifications (*d*)) foreign, and is available whenever there has been such a decision upon any cause of action, and the plaintiff in whose favour it was given seeks to put forward in a second action upon the same cause of action a claim which it was open to him to put forward in the first action (*e*). Two actions may, however, be brought upon the same facts if they give rise to distinct causes of action (*f*). The principal test to apply in order to ascertain whether a judgment recovered in one action enables the defendant to set up the defence of *res judicata* as a bar to a subsequent action against him by the same plaintiff is whether the same evidence would prove the plaintiff's case in the two actions (*g*). Thus a plaintiff who has recovered damages for injury to his person caused by the defendant's negligence cannot in a subsequent action recover

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(*a*) *Smith* v. *Nicolls* (*ubi supra*); *Barber* v. *Lambe*, 8 C. B. (N.S.) 95; 29 L. J. C. P. 234; 2 L. T. 238; 125 R. R. 590.

(*b*) *Barber* v. *Lambe* (*ubi supra*); *Re May*, 28 Ch. D., at p. 518; 54 L. J. Ch. 338; 52 L. T. 78; 1 T. L. R. 78.

(*c*) This term does not mean a judgment which is not open to appeal but merely a judgment which is "final" as opposed to "interlocutory," *Huntly (Marchioness)* v. *Gaskell*, [1905] 2 Ch. 656; 75 L. J. Ch. 66; 93 L. T. 785; 22 T. L. R. 20; *Beatty* v. *Beatty*, [1924] 1 K. B. 807; 93 L. J. K. B. 750; 131 L. T. 226.

(*d*) See *ante*, p. 18.

(*e*) *Nelson* v. *Couch*, 15 C. B. (N.S.), at pp. 108, 109; 33 L. J. C. P. 46; 8 L. T. 577; *Ord* v. *Ord*, [1923] 2 K. B., at p. 439; 92 L. J. K. B. 859; 129 L. T. 605; 39 T. L. R. 437.

(*f*) *Brunsden* v. *Humphrey*, 14 Q. B. D. 141; 53 L. J. Q. B. 476; 51 L. T. 529.

(*g*) *Id.*, and see *Ord* v. *Ord*, [1923] 2 K. B., at p. 432; 92 L. J. K. B. 859; 129 L. T. 605; 39 T. L. R. 437.

further damages for injury to his person (*h*); nor can a plaintiff who has obtained judgment for the delivery up of property maintain a subsequent action for damages for its detention, because he might have obtained this relief in the first action (*i*): but a plaintiff who has recovered damages for injury to his *property* caused by the defendant's negligence may bring a second action for injury to his *person* caused by the same negligence because damage to the person creates a cause of action which is different from that created by damage to property, and which would be proved and resisted by different evidence (*k*). Judgment *against* a plaintiff does not, strictly speaking, constitute a bar to a further action by him against the same defendant, but operates only by way of estoppel and only when the judgment was on grounds constituting a defence to the second action (*l*). In modern practice, however, this technical distinction is, in most cases, of no importance.

Estoppel is a rule of evidence by which a party to an action is, in certain cases, precluded from giving evidence to contradict that which he has previously admitted or, in case of a judgment, is deemed to have admitted (*m*). Upon this principle all judgments, both of English and (subject to limitations (*mm*)) of foreign Courts, create if properly pleaded, as between the parties to them and their privies, an estoppel both as to the matters actually decided and the necessary grounds of the decision (*n*). And, just as a plaintiff may not bring two actions upon the same cause of action, so also a defendant may not in a second action raise a defence which is inconsistent with any allegation by the plaintiff which could have been traversed in the first action (*o*).

(*h*) *Brunsden* v. *Humphrey* (*ubi supra*).

(*i*) *Serrao* v. *Noel*, 15 Q. B. D. 549; 1 T. L. R. 581.

(*k*) *Brunsden* v. *Humphrey* (*ubi supra*).

(*l*) Bullen & Leake (3rd ed.), p. 575; *Vooght* v. *Winch*, 2 B. & Ald., at p. 670; 21 R. R. 446; *Newington* v. *Levy*, L. R. 6 C. P. 180; 40 L. J. C. P. 29; 23 L. T. 595; *Moss* v. *Anglo-Egyptian Navigation Co.*, L. R. 1 Ch. 108; 35 L. J. Ch. 179.

(*m*) *Low* v. *Bouverie*, [1891] 3 Ch., at p. 105; 60 L. J. Ch. 594; 65 L. T. 533; 7 T. L. R. 582; *Bateman* (*Lady*) *v. Faber*, [1898] 1 Ch., at p. 150; 67 L. J. Ch. 130; 77 L. T. 576; 14 T. L. R. 81; *Fry* v. *Smellie*, [1912] 3 K. B., at p. 295; 81 L. J. K. B. 1003; 106 L. T. 404. See also *Ord* v. *Ord* (*ubi supra*).

(*mm*) See *ante*, p. 18, note (*b*).

(*n*) This rule will be discussed more fully, see *post*, Part IV., "Estoppel."

(*o*) Bullen & Leake (3rd ed.), p. 575; *Humphries* v. *Humphries*, [1910]

In modern practice, whenever a cause of action has been adjudicated upon by a Court of competent jurisdiction and either party seeks to bring a fresh action upon any question which in substance has become *res judicata* by such adjudication, the action will be dismissed as frivolous and vexatious, for it is not competent for a Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal (*p*).

Section 3.—*Specialty Contracts.*

A specialty, or contract under seal, is the only *formal* contract, because it derives its validity neither from the fact of agreement, nor from the consideration which may exist for the promise of either party, but because it is expressed in the form of a *deed*.

A deed is a writing, sealed by the party to be bound and delivered to the party to be benefited thereby, constituting and testifying to the performance by the former of some act in the law, such as a conveyance of property, or the making of a contract. It may be unilateral, *i.e.*, executed by one party and binding him only, as in the case of a bond; or bilateral, *i.e.*, executed by two parties and containing an agreement binding both.

The common law essentials for the execution of a deed are the sealing and delivery. As to the sealing, the placing of a finger upon a seal already affixed is, in practice, deemed sufficient. Delivery does not necessarily entail a physical

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2 K. B. 531; 79 L. J. K. B. 919; 103 L. T. 14; *Cooke* v. *Rickman*, [1911] 2 K. B. 1125; 81 L. J. K. B. 38; 105 L. T. 896 (*Held*, in this case, that the defendant having in one action admitted that rent was due from her under an agreement, was estopped in a second action from raising the defence of no consideration for the agreement). Compare *Mangena* v. *Wright*, [1909] 2 K. B. 958; 78 L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534 (*Held*, that a defendant who in one action for libel had admitted that charges made by him against the plaintiff were defamatory and untrue was not, when sued for a second publication of the same charges, estopped from raising the defences of fair comment and privilege).

(*p*) *Badar Bee* v. *Habib Merican Noordin*, [1909] A. C., at p. 623; 68 L. J. P. C. 161. For illustrations, see *MacDougall* v. *Knight*, 25 Q. B. D. 1; 59 L. J. Q. B. 517; 63 L. T. 43; 6 T. L. R. 276; *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677; 67 L. J. Q. B. 477; 78 L. T. 371. A judgment may, however, be impeached on the ground that it was obtained by fraud: *post*, Part IV.

transfer, and may be by any acts or words that sufficiently show that it was intended to be finally executed, even though it remains in the possession of the maker (*r*). "The efficacy of a deed depends on its being sealed and delivered by the maker of it; not on his ceasing to retain possession of it" (*s*). And it is clear on the authorities . . . that the deed [when sealed and delivered] is binding on the obligor before it comes into the custody of the obligee, nay, even before he knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it" (*t*).

The maker of a deed may deliver it so as to suspend or qualify its binding effect by declaring that it shall have no effect until a certain time has arrived, or till some condition has been performed. In such a case the instrument is in the meantime a mere *escrow*, but when the time has arrived or the condition has been performed, it takes effect from the date of its first delivery as an escrow, and binds the maker whether he has parted with the possession or not (*u*). A deed cannot be delivered as an escrow to the other party to it; it must be to some third person, but it may be delivered to a solicitor acting for all parties (*x*); and it has been held that where there are several grantees, and one of them is a solicitor acting for himself and the other grantees, the deed may be delivered to him as an escrow (*y*).

There was formerly some doubt as to whether a deed need be signed. Now, however, with regard to deeds executed after 1925, it is provided, by s. 73 of the Law of Property Act, 1925, that when an individual executes a deed he shall either sign or place his mark upon it, and sealing alone shall not be deemed sufficient (*z*).

(*r*) *Xenos* v. *Wickham*, L. R. 2 H. L., at p. 312; 36 L. J. C. P. 313. In practice, uttering the words "I deliver this as my act and deed" is deemed equivalent to a delivery. *Id.*, at p. 320. See also *Macedo* v. *Stroud*, [1922] 2 A. C., at p. 337; 91 L. J. P. C. 222.

(*s*) L. R. 2 H. L., at p. 323.

(*t*) *Id.*, at p. 312.

(*u*) *Id.*, at p. 323.

(*x*) *Millership* v. *Brooks*, 5 H. & N. 797; 29 L. J. Ex. 369; 120 R. R. 835; *Watkins* v. *Nash*, L. R. 20 Eq. 262; 44 L. J. Ch. 505.

(*y*) *London Freehold and Leasehold Property Co.* v. *Suffield*, [1897] 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445.

(*z*) By s. 74 of the Act provisions are also made for the execution of deeds by or on behalf of corporations.

Characteristics of Specialty Contracts.

1. *Merger.*—Just as all inferior contracts merge into a contract of record, so, if two parties enter into a simple contract and subsequently enter into another contract under seal in respect of the same subject-matter, the simple contract is merged into the specialty contract and ceases to exist (*a*).

2. *Limitation.*—An action on a deed is barred after twenty years, an action on a simple contract after six years.

3. *Estoppel.*—The principle of estoppel applies also to specialty contracts and prevents a party to a deed from denying in any action on the deed the truth of any matters which he has therein asserted or admitted. But, just as a person may deny the existence of the record which is alleged to create the estoppel (*nul tiel record*), so also he may set up that he never executed the deed alleged to be his (*non est factum*). And he may also set up the illegality of a deed, or that it was obtained by fraud. Thus, in the leading case of *Collins* v. *Blantern* (*b*), the plaintiff sued on a bond executed by certain parties, of whom the defendant was one. The defendant pleaded the following facts: Certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. Before the trial an agreement was made between Collins, Rudge, Blantern, and the parties prosecuted, by which (i) Collins gave to Rudge, in consideration of his agreement not to appear as prosecutor or give evidence, a promissory note for £350, and (ii) in order to indemnify Collins the bond on which he was suing was executed by Blantern and two of the parties prosecuted. It was held that the promissory note and the bond were both void, being given for an illegal consideration, namely, the stifling a criminal prosecution, and further that the defendant was not estopped from pleading the facts showing it to be void.

It may here be noticed that the doctrine of estoppel is not confined to contracts of record and specialty contracts. There is also another kind of estoppel, namely, estoppel *in pais*, or by conduct, which may arise even from a simple contract. Estoppel

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(*a*) *Price* v. *Moulton*, 10 C. B. 561; 20 L. J. C. P. 102; 84 R. R. 698.
(*b*) (1767), 1 S. L. C. 369; 2 Wilson, 341. See also *Hill* v. *Manchester, etc., Waterworks*, 2 B. & Ad. 544; 1 L. J. K. B. 230; 36 R. R. 656.

in pais is not, however, based upon the same grounds as estoppel by record or by deed. Thus, at Common Law, the effect of a receipt by deed was to estop the party giving it from denying that the money was paid (*c*); but a mere receipt in writing not under seal is of itself only an acknowledgment, which is merely *prima facie evidence* against the party giving it and may be rebutted by proof that the money was not in fact paid (*d*).

4. *Consideration.*—A deed requires no consideration. It is sometimes said that a deed "imports" consideration: this statement is, however, inaccurate, since the efficacy of a deed depends entirely upon its form, and, as we have seen, the validity of contracts under seal was recognised long before the doctrine of consideration came into existence: the true explanation is that the doctrine of consideration was not allowed to impair the efficacy of deeds (*e*).

It must, however, be noticed that, even when a deed is founded on valuable consideration, it may be void if the consideration was illegal, or if the purpose for which the deed was executed was unlawful at Common Law or by statute, as, for example, where its purpose was to defraud creditors (*f*).

The statutes relating to frauds upon creditors deal more particularly with fraudulent transfers and conveyances of property than with fraudulent contracts, but may be briefly noted (*g*).

By s. 172 of the *Law of Property Act*, 1925, every conveyance of property made with intent to defraud creditors is voidable at the instance of any person thereby prejudiced. This section does not, however, extend to any estate or interest in property conveyed for valuable consideration and in good faith, or upon good consideration and in good faith, to any person not having,

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(*c*) In Equity, however, a person giving a receipt by deed was not prevented from showing that the money had not been paid (*Winter* v. *Lord Anson*, 3 Russ. 488; 6 L. J. (o.s.) Ch. 7; 27 R. R. 171); and by s. 44 of the *Judicature Act*, 1925 (*ante*, p. 3), the equitable rule now prevails.

(*d*) See *Lee* v. *Lancashire and Yorkshire Railway Co.*, L. R. 6 Ch., at pp. 534, 536.

(*e*) See Williams' Personal Property, p. 191. But *Equity* would not enforce a promise made without consideration, even though under seal, and this rule still applies when *specific performance* of a contract is sought (Wilshere's Equity, Chapter XIII.).

(*f*) See *post*, Part I., Chapter IV.

(*g*) See also Wilshere's Equity, Chapter II., section 1.

at the time of the conveyance, notice of the intent to defraud creditors (*h*).

By s. 173 of the *Law of Property Act*, 1925, every voluntary disposition of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser. But for the purposes of this section no voluntary disposition shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made if such subsequent conveyance was made after June 28, 1893 (*i*). By s. 205 of the Act the word "disposition" includes a conveyance, and the word "conveyance" includes a charge.

By s. 42 of the *Bankruptcy Act*, 1914—

(i) Voluntary settlements are, in certain circumstances, made void against the trustee in bankruptcy of the settlor (*k*).

(ii) Any *covenant* made by a person in consideration of marriage for the future payment of money to his or her future wife, husband or children, or for the future settlement upon them of property in which he or she has not at the time of marriage any estate or interest, and which is not money or property in right of the settlor's wife or husband, is void against the trustee in bankruptcy if the settlor is adjudged bankrupt and the covenant has not been executed before the commencement of the bankruptcy; but the persons entitled under the covenant may claim

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(*h*) This section re-enacts 13 Eliz. c. 5. Under that Act it was held that whether or not an intent to defraud creditors existed was in each case a question of fact (*Godfrey* v. *Poole*, 13 A. C., at p. 503), and that such an intent could not be inferred merely because creditors were defeated (*Ex p. Mercer, re Wise*, 17 Q. B. D. 290; 54 L. T. 720; 55 L. J. Q. B. 558; *Re Lane-Fox, ex p. Gimblett*, [1900] 2 Q. B. 508; 69 L. J. Q. B. 722; 83 L. T. 176), though it might be inferred if the *necessary* result was to defeat creditors (*Freeman* v. *Pope*, L. R. 5 Ch. 538; 39 L. J. Ch. 689; *Re Holland*, [1902] 2 Ch., at p. 381), or if any facts showed that the apparent object was to put the property out of reach of contemplated creditors (*Spirett* v. *Willows*, 3 De G. J. & S. 293; 34 L. J. Ch. 367; *Ex p. Russell, re Butterworth*, 19 Ch. D. 588; 51 L. J. Ch. 521).

(*i*) This section re-enacts 27 Eliz. c. 4, and the Voluntary Conveyances Act, 1893.

(*k*) The word "void" in the Act must be construed as meaning "voidable," see *Re Hart*, [1912] 3 K. B., at p. 70; 81 L. J. K. B. 663; 106 L. T. 431 (a decision upon s. 47 (1) of the Bankruptcy Act, 1883, which is in the same words). Accordingly a purchaser for value from the donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor is entitled to hold the property as against the trustee in bankruptcy. *Id.*

for a dividend in the settlor's bankruptcy after all claims of creditors for valuable consideration have been satisfied.

By s. 44 of the *Bankruptcy Act*, 1914, it is provided (*inter alia*) that every transfer of property, every payment made and every *obligation* incurred by a person unable to pay his debts as they become due, in favour of any creditor, with a view to giving such creditor a preference over the other creditors, shall, if such person is adjudged bankrupt on a petition presented within three months after the date of such transfer, &c., be deemed fraudulent and void against the trustee in bankruptcy, but this shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

Contracts for which a Deed is required.—A deed is necessary:

1. *By statute* in various cases, as, *e.g.*, for leases of land for more than three years and for the transfer of a British ship or any share therein.

2. *At Common Law*, for the contracts of corporations and for the appointment of an agent with authority to execute a deed.

Most of these cases will be dealt with hereafter, and at present we shall consider only contracts made by corporations.

Contracts of Corporations.—A corporation is a legal person, with an independent legal existence and legal capacities, rights and liabilities distinct from those of the individuals who compose it (*l*). It may be either a corporation sole, *i.e.*, composed of one person (*e.g.*, a bishop or the Public Trustee), or a corporation aggregate, *i.e.*, composed of many persons (*e.g.*, a municipal corporation or a company incorporated by Act of Parliament). Its chief characteristics are (i) a corporate name, by which it can sue and be sued and hold property; (ii) a common seal, indicating its unity and authenticating its acts; (iii) a continuous existence by reason of the perpetual succession of its members.

A corporation aggregate, being an artificial person, can act only by an agent, and its seal is the only authentic evidence of what it has done or agreed to do, so that as a general rule it can

(*l*) *Re Sheffield, etc. Society*, 22 Q. B. D., at p. 476; 58 L. J. Q. B. 265; *Salomon* v. *Salomon & Co.*, [1897] A. C., at p. 51; 66 L. J. Ch. 35; 75 L. T. 426.

be bound only by contracts made under its seal. To this rule, however, there are the following exceptions:—

1. A corporation created for trading purposes may make without seal any contract entered into for the purpose for which it was incorporated (*m*).
2. Any corporation, whether incorporated for trading purposes or otherwise, may do so in matters of trifling importance or frequent occurrence or matters of urgent necessity (*n*).

   But under s. 174 of the *Public Health Act*, 1875, every contract made by an urban authority under the powers of the Act, whereof the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority (*o*).
3. "Where work is done or services rendered at the request of the corporation in respect of matters for the doing of which it was created and the benefit of the work or services is accepted by the corporation, so that a contract to pay would be implied in the case of a private person, a similar implication should be made in the case of a corporation" (*p*).
4. Conversely, when such an agreement, though not under seal, has been executed by the corporation, it may sue thereon (*q*).

(*m*) *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P. 463; 4 C. P. 617; 38 L. J. C. P. 338.

(*n*) *Wells* v. *Mayor of Kingston-upon-Hull*, L. R. 10 C. P. 402; 44 L. J. C. P. 257.

(*o*) See *Hunt* v. *Wimbledon Local Board*, 4 C. P. D. 48; 48 L. J. C. P. 207; *Young* v. *Mayor of Leamington*, 8 A. C. 517; 57 L. J. Q. B. 292. The section does not apply to an urban authority acting under the powers of a different Act but it applies where, by a different Act, it is provided that an urban authority shall have the same powers as if it were acting under the Public Health Act, 1875 (*Nixon* v. *Erith Urban Council* [1924] 1 K. B. 819; 93 L. J. K. B. 756; 40 T. L. R. 1). The section applies only where at the time of entering into the contract the parties contemplate that the value or amount will exceed £50 (*Eaton* v. *Basker*, 7 Q. B. D. 529; 50 L. J. Q. B. 444).

(*p*) *Lawford* v. *Billericay Rural Council* [1903] 1 K. B., at p. 786; 72 L. J. K. B. 554; 88 L. T. 317; following *Clarke* v. *Cuckfield Union*, 21 L. J. Q. B. 349; *Nicholson* v. *Bradfield Union*, 1 Q. B. 620. See also *Douglass* v. *Rhyl Urban Council* [1913] 2 Ch. 407; 109 L. T. 30. This rule does not, however, apply to cases within s. 174 of the Public Health Act, 1875 (*Young* v. *Mayor of Leamington*, *ubi supra*; *Nixon* v. *Erith Urban Council*, *ubi supra*).

(*q*) *Doe* d. *Pennington* v. *Taniere*, 12 Q. B., at 1013; 21 L. J. Q. B. 361;

5. By s. 76 of the *Companies (Consolidation) Act*, 1908, the contract of a company incorporated under that Act need only be under the seal of the company when the same would, if made by a private person, require a seal; where, if made by a private person, the contract would require writing signed by the party to be charged, it may be made on behalf of the company in writing signed by some person authorised by the company; and where no writing would be necessary if the contract were made by a private person it may be made by parol by some person authorised by the company, and any contract may be varied or discharged in the same manner as it was made (*r*).

Simple Contracts.

The law relating to parol or simple contracts governs all contractual obligations arising otherwise than by record or deed (*s*). The essentials of a simple contract, as distinct from the two former classes, are (i) an agreement, which is (ii) made for valuable consideration, and (iii) represents the real and unimpeachable consent of the parties. It may, subject to certain exceptions, be made either orally or in writing, or, even though not expressed by words or writing, it may be inferred from conduct or implied by law; in some cases, moreover, a contractual obligation may arise from a quasi-contract. In the next chapter we shall consider the formation of a simple contract and the rules relating to consideration.

Fishmongers' Co. v. *Robertson*, 5 Man. & G., at p. 192; 12 L. J. C. P. 185; 63 R. R. 242.

(*r*) See also the Companies Clauses (Consolidation) Act, 1845, s. 97. The same rules govern contracts by registered industrial and provident societies (56 & 57 Vict. c. 39, s. 35).

(*s*) All contracts arising otherwise than by record or deed are parol contracts, whether oral or in writing (*Beckham* v. *Drake*, 9 M. & W., at p. 93; 11 L. J. Ex. 201; *Calder* v. *Dobell*, L. R. 6 C. P., at pp. 492, 493; 40 L. J. C. P. 224; 25 L. T. 129).

CHAPTER II.

FORMATION OF SIMPLE CONTRACTS.

SECTION 1.—*Agreements.*

Definition.—An agreement is formed by the declaration by two or more parties of their consent that some act or thing shall be done or forborne by some or one of those parties for the others or other of them.

Parties.—There must be at least two parties to an agreement. One person cannot make an agreement with himself, and, by s. 82 of the *Law of Property Act*, 1925, an agreement entered into by a person with himself and one or more other persons, whether entered into before or after the commencement of the Act, is to be construed as if it had been entered into with the other person or persons alone.

Where a promise is made by two or several persons their rights and liabilities may be either *joint*, or *several*, or (in the case of liabilities only (*a*)) *joint and several.*

In some cases rights or liabilities can only be joint, thus the acceptors of a bill of exchange can only be liable jointly (*b*). Where no such rule of law exists a promise made by two or more persons is construed according to the natural meaning of the language used, and if they contract generally without any words of severance their liability will be joint, but if there are words of severance it will be several or joint and several; if, however, the language is ambiguous the nature of the liability will depend upon the interests of the covenantors; where, on the other hand, a promise is made *to* more than one person it will be construed

(*a*) *Bradburne* v. *Botfield*, 14 M. & W. 559; 14 L. J. Ex. 330.
(*b*) Bills of Exchange Act, 1882, s. 6 (2).

according to their interests, unless it is incapable of being so construed (*c*).

Where a contract is joint all the surviving contractors must join as plaintiffs (*d*); they should also be joined as defendants, for, although each is liable for the whole (*e*), yet, if one is sued separately, he has a right to have his co-contractors joined as defendants if they are alive and within the jurisdiction of the Court (*f*) and can be found by the plaintiff (*g*): but there is only one cause of action against joint contractors so that if for any reason judgment is recovered against one or some only of them it is a bar to any further proceedings against the rest (*h*).

Where, on the other hand, a contract is several or joint and several, it creates distinct causes of action. Hence any one of the promisors or promisees may be sued or sue separately, and a judgment against one does not bar proceedings against the rest (*i*).

Declaration of Consent.—The declaration of consent by the parties to an agreement may be effected by their expression of

(*c*) *Sorsbie* v. *Park*, 12 M. & W. 146; 13 L. J. Ex. 9; 67 R. R. 283; *Bradburne* v. *Botfield* (*ubi supra*); *Hopkinson* v. *Lee*, 6 Q. B. 964; 14 L. J. Q. B. 101; 66 R. R. 617; *Re Smith, Fleming & Co.*, 12 Ch. D. 557; 48 L. J. Bkcy. 115; 41 L. T. 517; *Palmer* v. *Mallett*, 36 Ch. D. 411; 57 L. J. Ch. 226; 58 L. T. 64; 3 T. L. R. 760; *White* v. *Tyndale*, 13 A. C. 263; 57 L. J. P. C. 114; 58 L. T. 741; 4 T. L. R. 40. See also *Lee* v. *Nixon*, 1 Ad & E. 201; 3 L. J. K. B. 160; *Addison* v. *Gibson*, 10 Q. B. 106; 16 L. J. Q. B. 165; *Tyser* v. *Shipowners' Syndicate*, [1896] 1 Q. B. 135; 65 L. J. Q. B. 238; 73 L. T. 605; 12 T. L. R. 88.

(*d*) See cases in preceding note, and *Foley* v. *Addenbrooke*, 4 Q. B. 197; 12 L. J. Q. B. 163; 62 R. R. 326.

(*e*) *Richards* v. *Heather*, 1 B. & Ald. 29.

(*f*) *Re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; 2 T. L. R. 73; *Pilley* v. *Robinson*, 20 Q. B. D. 155; 57 L. J. Q. B. 54; 58 L. T. 110; *Wilson* v. *Balcarres, etc., Co.*, [1893] 1 Q. B. 422; 62 L. J. Q. B. 245.

(*g*) *Robinson* v. *Geisel*, [1894] 2 Q. B. 685; 64 L. J. Q. B. 52; 71 L. T. 70.

(*h*) *Kendall* v. *Hamilton*, 4 A. C. 504; 48 L. J. Q. B. 705; 41 L. T. 418; *Isaacs* v. *Salbstein*, [1916] 2 K. B. 139; 114 L. T. 924; 85 L. J. K. B. 1433; *Pirie* v. *Richardson*, [1927] 1 K. B. 448; 96 L. J. K. B. 42. Where, however, all the co-contractors have been joined as defendants, a judgment obtained against one on default of appearance (Order XIII., r. 4. 6), or on default in pleading (Order XXVII., r. 3, 5), or on proceedings under Order XIV. (*Id.*, r. 5), does not prejudice the right of the plaintiff to continue the proceedings against the rest.

(*i*) *Isaacs* v. *Salbstein* (*ubi supra*): see also cases cited in note (*e*) and note (*h*), *ante*. Where, however, a contract is joint and several, though each of the promisors can be sued, yet the debt or damages can only be recovered once by the plaintiff: *Henry* v. *Goldney*, 15 M. & W. 494; 15 L. J. Ex. 298.

agreement to some spoken or written terms put before them by a third party. Thus, where A and B, who were yacht owners, entered for a club race, each signing a letter to the secretary of the club, undertaking to be bound by certain rules, it was held that these letters constituted a contract between A and B on the terms of the rules (*k*).

Usually, however, the terms of an agreement are found in an *offer* made by one party and an *acceptance* of that offer by the other party. Such offer or acceptance may be express or may be inferred from conduct.

Offer and Acceptance.

Offer.—An offer is an inchoate or conditional promise, intended to become binding, and becoming binding, only upon acceptance. It need not be in any particular form; it is not even necessary that it should be made by words, written or spoken, for it may consist of an act, and may be inferred from conduct, as in the familiar instances of the offers made to the public by railway companies, omnibus proprietors and the owners of automatic machines, the offer in the last case being made by the mere exhibition of the machine. The elements of an offer are (i) a definite proposal communicated by one person to another; (ii) an undertaking by the proposer, either express or inferred, that his proposal shall be binding upon him if accepted. There must be an offer *to be bound*, as distinct from a statement which merely expresses an intention or invites negotiations or gives information (*l*). Thus a mere promise "to favourably consider an application" for the renewal of a contract is not an offer capable of creating a contractual obligation (*m*). So also where an auctioneer advertised a sale of property, but some of the lots were withdrawn without notice, it was held that the advertisement was a mere declaration of intention and not an offer to persons who might attend the sale that all the lots should

(*k*) *The Satanita*, *Clarke* v. *Dunraven*, [1897] A. C. 59; 66 L. J. Adm. 1; 75 L. T. 337.

(*l*) See *Farina* v. *Fickus*, [1900] 1 Ch. 331; 69 L. J. Ch. 161; 81 L. T. 749; *Price* v. *Rhondda U. D. C.*, [1923] 2 Ch. 372; 93 L. J. Ch. 1.

(*m*) *Montreal Gas Co.* v. *Vasey*, [1900] A. C. 595; 69 L. J. P. C. 134; 83 L. T. 233.

be put up for sale (*n*). Again, where the defendants issued a circular saying that they were "instructed to offer to the wholesale trade for sale by tender" certain stock-in-trade, it was held that those words did not amount to a promise to sell to the highest bidder, but was a mere intimation that the defendants were willing to receive offers (*o*). So also the mere quotation of a price in answer to an enquiry is not an offer (*p*).

An offer need not be addressed to a definite person; it may be made to the world at large. Thus an advertisement offering a reward for certain information is a promise to pay the reward to any person who shall give the information which is required (*q*). So, in the case of *Carlill* v. *Carbolic Smoke Ball Co.* (*r*) the defendants published an advertisement, offering £100 reward to anyone who should contract influenza after having used one of their smoke balls in accordance with certain prescribed conditions, and stating that they had deposited £1,000 with a bank to show their sincerity. A lady, having read the advertisement, bought a smoke ball and used it in compliance with the directions, but nevertheless contracted influenza. It was argued (*inter alia*) that there was no offer, but a mere statement of intention, and secondly, that, even if there was an offer, it could not become binding, because it was not made to any particular person. It

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(*n*) *Harris* v. *Nickerson*, L. R. 8 Q. B. 286; 42 L. J. Q. B. 171; 28 L. T. 414. But where a sale is advertised as *without reserve* and a lot is put up, there is an undertaking by the auctioneer and the vendor that the sale shall be without reserve, and accordingly there is a contract with the highest bidder that he shall be the purchaser (*Id.*, at p. 289; *Warlow* v. *Harrison*, 1 E. & E. at p. 316; 29 L. J. Q. B. 14; *Johnston* v. *Boyes*, [1899] 2 Ch. 73; 68 L. J. Ch. 425; 80 L. T. 488). This contract is, however, distinct from the actual contract of sale ([1899] 2 Ch., at p. 87), in which the bid is the offer (1 E. & E., at pp. 307, 317).

(*o*) *Spencer* v. *Harding*, L. R. 5 C. P., at p. 561; 39 L. J. C. P. 332; 23 L. T. 237. But if the circular had said "And we undertake to sell to the highest bidder," there would have been a contract with the highest bidder (*Id.*, at p. 563).

(*p*) *Harvey* v. *Facey*, [1893] A. C. 552; 62 L. J. P. C. 127; 69 L. T. 504. See also *Boyers* v. *Duke*, [1905] 2 Ir. R. 617. So, also, when a tradesman sends out a price-list it is not an offer to supply an unlimited quantity of the goods at the prices named, and the giving of an order for the supply of goods named in the list does not of itself create a contract. Until something is done by the person receiving the order which amounts to an acceptance, there is no contract (*Grainger & Son* v. *Gough*, [1896] A. C., at pp. 333, 334; 65 L. J. Q. B. 410).

(*q*) *Williams* v. *Carwardine*, 4 B. & Ad., at p. 623; 2 L. J. K. B. 101; 38 R. R. 328.

(*r*) [1893] 1 Q. B. 256; 62 L. J. Q. B. 257; 67 L. T. 837.

was held, upon the language of the advertisement, that there was a definite and express offer, and, in the second place, that it was an offer made to anybody who performed the conditions named in the advertisement, and that there was therefore a contract with anyone who accepted the offer by performing the conditions.

But although the offer need not be made to a definite person, it cannot be accepted by a person to whom it was not in fact communicated. Accordingly, when a general offer is made to the public, or a reward is offered to any person giving information, there is no contract with a person who, without knowledge of the offer, fulfils its conditions or supplies the information (*s*).

So also if A, without the knowledge of B, renders to B services which he has no option of either refusing or accepting, B is under no liability to A merely because he has received some benefit from the services rendered (*t*).

Conversely a person who accepts an offer is bound only by the terms communicated to him. In some cases, however, communication may be inferred from reasonable notice.

The question whether an offer has been communicated to a person who is alleged to have accepted it has often arisen in connection with conditions printed or written upon tickets, receipts and other documents which in the course of a contract are delivered by one party to another. To such documents the following rules apply (*u*):—

1. A distinction exists between documents such as ordinary tickets or receipts, which do not usually contain special conditions, and documents which, from their form or from the nature of the transaction, must be presumed to contain the conditions of the contract (*u*).
2. In the first class of cases the question is whether or not the document did in fact contain the contract, and the

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(*s*) *Carlill* v. *Carbolic Smoke Ball Co.* [1892] 2 Q. B., at p. 489, note (2); 61 L. J. Q. B. 696.

(*t*) *Taylor* v. *Laird*, 1 H. & N. 266; 25 L. J. Ex. 329.

(*u*) *Parker* v. *South Eastern Railway*, 2 C. P. D. 416; 46 L. J. C. P. 768; *Watkins* v. *Rymill*, 10 Q. B. D. 178; 52 L. J. Q. B. 121; *Roe* v. *Naylor, Ltd.*, [1917] 1 K. B. 712; 86 L. J. K. B. 771; 33 T. L. R. 203; *Hood* v. *Anchor Line, Ltd.*, [1918] A. C. 837; 87 L. J. P. C. 156; 34 T. L. R. 550; *Gibaud* v. *Great Eastern Railway* [1921] 2 K. B. 427; 90 L. J. K. B. 535.

onus is on the party delivering it to show that he intended that it should contain the terms of the contract and that the other party, when he received it, *knew or had reasonable notice* of this, and either assented or did not object (*x*). This is a question of fact, and the proper questions for the jury are (*y*): (i) Did the recipient know that there was writing or printing on the ticket? (ii) Did he know that the writing or printing contained terms relative to the contract? (iii) Did the other party do what was reasonably sufficient to give the recipient notice of the conditions? If the recipient did not know and had not reasonable notice that there was writing or printing, he is not bound (*z*). If he knew or had reasonable notice that there was writing or printing and knew or believed that it contained conditions, he is bound: and even if he did not know that it contained conditions he is bound if he had reasonable notice that it contained conditions (*a*). The degree of notice necessary depends upon the degree of intelligence of the recipient (*b*).

3. In the second class of cases, where the document is one which ordinarily does contain the terms of the contract, as, for instance, in the case of a bill of lading or sold-note, the question is whether those terms have been assented to. If the recipient signs such a document he is taken to have assented to its terms; and if, though he does not sign it, he receives it without dissent, he is *prima facie* taken to have assented (*c*).

4. In either case, however, the question may arise whether a particular clause in the conditions was assented to. Here the question, which is one of fact, is whether the document was in such a form that a reasonable man

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(*x*) *Parker* v. *South Eastern Railway* (*ubi supra*); *Roe* v. *Naylor* (*ubi supra*); *Hood* v. *Anchor Line, Ltd.* (*ubi supra*).

(*y*) *Richardson, Spence & Co.* v. *Rowntree*, [1894] A. C. 216; 63 L. J Q. B. 283 (steamship ticket).

(*z*) *Henderson* v. *Stevenson*, L. R. 2 H. L. Sc. 470; 132 L. T. 709.

(*a*) *Parker* v. *South Eastern Railway* (*ubi supra*).

(*b*) *Cooke* v. *Wilson*, 85 L. J. K. B., at p. 898.

(*c*) *Roe* v. *Naylor* (*ubi supra*).

reading the document with reasonable care might and did fail to see that the particular clause formed part of the contractual terms, as, for example, where he was misled by any ambiguity in the writing, or by the condition being placed in a part of the document in which a man of ordinary care and intelligence would not expect to find it, or if it was printed in such small and illegible type as to be unreadable by a person of ordinary eyesight (*d*).

Revocation and Lapse of Offer.—An offer when once made is deemed to be continuous and to remain open for acceptance until it is revoked or lapses.

Revocation.—Until it is accepted an offer has no binding effect and may be revoked by the party making it, even though he expressly gives the person to whom it is made a certain time within which to accept or reject it. Thus, where A offered to purchase a house and to give B six weeks for a definite answer, it was held that A might, even within the six weeks, retract his offer if it had not yet been accepted by B (*e*).

Revocation has no effect until it has been communicated to the party to whom the offer was made (*f*). But it is not always necessary that there should be an express communication or that it should be communicated by the party making the offer: it may be sufficient if the other party has, from any source, knowledge of facts inconsistent with the continuance of the offer. Thus, A offered to sell a house to B and to leave the offer open for a certain time, but, before the expiration of that time and before any acceptance by B, sold to C. B, knowing of the sale,

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(*d*) *Roe* v. *Naylor* (*ubi supra*). See also *Stephen* v. *International Sleeping Car Co.*, 19 T. L. R. 621 (where an important condition was placed in the middle of a number of advertisements), and *Walls* v. *Centaur Co.*, 126 L. T. 242 (where a catalogue of bicycles did not sufficiently call attention to special terms of sale printed at its end).

(*e*) *Routledge* v. *Grant*, 62 L. J. C. P. 166; 29 R. R. 672; 4 Bing. 653. See also *Dickinson* v. *Dodds*, 2 Ch. D. 463; 45 L. J. Ch. 777; 34 L. T. 607. This rule, as we have seen (*ante*, p. 26), does not apply to offers under seal. Nor does it apply to options given for valuable consideration and created by a preliminary contract which is in itself complete, as, *e.g.*, where A pays B £100 for a three months' option on a house, that is to say, for the right to buy the house at a certain price at any time within three months.

(*f*) *Byrne* v. *Van Tienhoven & Co.*, 5 C. P. D. 344; 49 L. J. C. P. 316; 42 L. T. 371; *Stevenson* v. *Maclean*, 5 Q. B. D. 356; 49 L. J. Q. B. 701.

accepted within the time fixed. It was held that there was no contract, that B could not accept after he knew that A had done an act which rendered impossible the performance of the offer (*g*).

Lapse.—Even if there is no express revocation an offer may lapse—

1. By the death of the party by whom (*h*) or to whom the offer is made (*i*).
2. By non-acceptance within the time fixed by the offeror (*k*) or within a reasonable time (*l*). Where an offer is by telegram it may be inferred that acceptance by telegram is required, and an acceptance by letter may not be within a reasonable time (*m*).
3. By its refusal by the party to whom it is made (*n*).

Acceptance.—Acceptance turns the offer into a promise enforceable at law and so creates a contract. Like the offer, it need not be in any particular form and may be by writing or words or by an act, and it may be inferred or implied from conduct.

An acceptance must be made in accordance with any conditions imposed by the offer; thus, as we have just seen, where the offer is open only for a fixed time the acceptance must be within that time. But if the acceptance is delayed by the fault of the offeror, it may be valid though made after the time fixed. Thus A by letter offered to sell goods to B, *receiving an answer by return of post*, but misdirected the letter, so that it was received two days late by B, who immediately posted his answer. It was held that, since the delay was caused by the fault of A, the answer of B must be taken to have been received by return of post (*o*). And even though the time for acceptance has elapsed there may be an agreement implied from the conduct of

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(*g*) *Dickinson* v. *Dodds*, (*ubi supra*). See also *Cartwright* v. *Hoogstoel*, 105 L. T. 628.

(*h*) *Dickinson* v. *Dodds*, 2 Ch. D., at p. 475; 45 L. J. Ch. 777.

(*i*) See *Bagel* v. *Miller*, [1903] 2 K. B. 212; 72 L. J. K. B. 495. See also *Reynolds* v. *Atherton*, [1921] W. N. 174.

(*k*) *Tinn* v. *Hoffmann*, 29 L. T. 271.

(*l*) *Ramsgate Hotel Co.* v. *Montefiore*, L. R. 1 Ex. 109; 35 L. J. Ex. 90.

(*m*) *Quenerduaine* v. *Cole*, 32 W. R. 185.

(*n*) See also *post*, p. 44.

(*o*) *Adams* v. *Lindsell*, 1 B. & Ald. 681; 19 R. R. 415.

the other party and the circumstances of the case either to enlarge the time for acceptance or to treat a late acceptance as a proper acceptance (*p*).

Though, however, the party making the offer may fix conditions for its acceptance, he cannot impose upon the other party an obligation to communicate his *refusal*. Thus A wrote to B making an offer for a horse, and saying: "If I hear no more about him, I consider the horse mine at £30 15s." It was held that A had no right to impose on B a sale of the horse unless he chose to comply with the condition of writing to refuse the offer (*q*).

Communication of acceptance.—An acceptance of an offer must be communicated by the party to whom it is made or his agent to the party making it or his agent. Thus A applied for the headmastership of a school, and the committee of selection passed a resolution to appoint him. One of the committee informed A of this resolution, not having any authority to do so. It was held that there was no contract, because there was no communication to A *by the committee* (*r*). So also where A applied for shares in a company and the shares were allotted to him by the directors, who communicated the fact of the allotment to their own agent and not to A, it was held that there had been no communication to A so as to prevent him from withdrawing his offer (*s*).

But "as notification of acceptance is required for the benefit of the person making the offer, [he] may dispense with notice to himself if he thinks it desirable to do so, and . . . where a person, in an offer made by him to another person expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself,

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(*p*) *Morrell* v. *Studd & Millington*, [1913] 2 Ch., at p. 658; 109 L. T. 628; 83 L. J. Ch. 114.
(*q*) *Felthouse* v. *Bindley*, 11 C. B. (N.S.) 868; 31 L. J. C. P. 204.
(*r*) *Powell* v. *Lee*, 99 L. T. 284.
(*s*) *Hebb's Case*, L. R. 4 Eq. 9; 36 L. J. Ch. 748; 16 L. T. 308.

performance of the condition is sufficient acceptance without notification" (*t*). Thus, where a person advertises a reward for the doing of an act, such as the return of a lost dog, it follows "as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with" (*u*). Accordingly, in the case of *Carlill* v. *Carbolic Smoke Ball Co.* (*x*) it was held that the performance by the plaintiff of the conditions of the advertisement was a sufficient acceptance without any notification to the defendants.

Postal communications.—"Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is *posted*" (*y*). And this rule applies, even though the acceptance is lost in the post and never reaches its destination (*z*).

It must be particularly noticed that this rule is the opposite of that applying to notice of revocation, which is not complete until *received* (*a*). Both rules are illustrated by the case of *Henthorn* v. *Fraser* (*b*).

In this case H, who lived at Birkenhead, called on July 7 at the office of the defendant in Liverpool, and received from the defendant's secretary a written offer to sell some houses for £750. On July 8, between 12 and 1 o'clock, the secretary

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(*t*) *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B., at p. 269; 62 L. J. Q. B. 257.

(*u*) *Id.*, at p. 270.

(*x*) *Ante*, p. 36.

(*y*) *Henthorn* v. *Fraser*, [1892] 2 Ch., at p. 33; 61 L. J. Ch. 373; 66 L. T. 439. Or as expressed by Kay, L.J., "Posting an acceptance of an offer may be sufficient where it can fairly be inferred from the circumstances of the case that the acceptance might be sent by post" [1892] 2 Ch., at p. 36. See also *Dunlop* v. *Higgins*, 1 H. L. C. 381; 73 R. R. 98; *Harris's Case*, L. R. 7 Ch. 587; 41 L. J. Ch. 251.

(*z*) *Household Fire Insurance Co.* v. *Grant*, 4 Ex. D. 216; 48 L. J. Ex. 577. But delivery of a letter to a town postman, who by the rules of the Post Office is forbidden to take charge of letters for the post, is not equivalent to posting the letter. *Re London and Northern Bank, Ex p. Jones*, [1900] 1 Ch. 220; 69 L. J. Ch. 24; 81 L. T. 512.

(*a*) *Ante*, p. 39.

(*b*) *Ubi supra.*

wrote to H, withdrawing his offer, and his letter reached Birkenhead at about 5.30 p.m. on the same day. In the meantime, however, H had, at 5.30 p.m. on July 8, posted a letter of acceptance, which reached the secretary on July 9. It was held (i) that, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post (*c*); (ii) that the acceptance by H was, therefore, complete as soon as it was posted; (iii) that the revocation of an offer is ineffectual until it is brought to the knowledge of the party to whom it is made (*d*), and that the secretary's letter withdrawing his offer was, therefore, too late to affect the acceptance.

The parties must be ad idem.—Acceptance must be complete, unqualified, and unconditional. This rule may be illustrated by the following examples:—

i. A wrote to B referring to a previous conversation and expressing his willingness to enter the service of B on certain terms then discussed, one of which was that a list of customers was to be made out upon whom A was to call and upon whose orders he was to have a commission. B replied that A's letter embodied the substance of the terms agreed upon and added in a postscript, "I have made a list of customers which we can consider together." It was held that these letters did not constitute a complete contract. "If the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not *ad idem*" (*e*).

ii. A wrote to B, offering to purchase property for £1,450. B's solicitor replied accepting the offer, but adding, "We enclose contract for your signature." The con-

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(*c*) On this point the judgment extended the cases of *Dunlop* v. *Higgins*, 73 R. R. 98; 1 H. L. C. 381; *Byrne* v. *Van Tienhoven*, 5 C. P. D. 344; 49 L. J. C. P. 316; 42 L. T. 371; and *Harris's Case*, L. R. 7 Ch. 587; 41 L. J. Ch. 261; where the offer was by post.

(*d*) Following *Byrne* v. *Van Tienhoven* (*ubi supra*) and *Stevenson* v. *Maclean*, 5 Q. B. D. 356; 49 L. J. Q. B. 701.

(*e*) *Appleby* v. *Johnson*, L. R. 9 C. P. 146; 43 L. J. C. P. 146; 30 L. T. 261. See also *Stanley* v. *Dowdeswell*, L. R. 10 C. P. 102.

tract contained special terms not mentioned in the offer. It was held that the letters showed merely an agreement as to the price, and that the letter of B's solicitor amounted to a counter-offer (*f*). It may be noted that a **counter-offer** puts an end to the original offer (*g*), but not a mere enquiry as to whether the offeror is willing to modify the terms of his offer (*h*), or as to the wishes of the offeror with regard to some matter which is not one of the terms of the contract (*i*).

iii. A offered to purchase a house on certain terms, "possession to be given on or before July 25." B wrote accepting the offer and saying that he would give possession on August 1. Held, that there was no acceptance (*k*).

iv. A wrote to B offering for sale "good" barley. B wrote accepting, but stated that he expected "fine" barley. The jury having found that there was a distinction in the corn trade between good barley and fine barley, it was held that there was no acceptance (*l*).

Reference to a formal contract.—Difficulties sometimes arise where parties in the course of negotiations have expressed an intention that their agreement shall be embodied in a formal contract. On this point the following rules have been laid down (*m*):—

So long as parties to an agreement are only in negotiation

(*f*) *Jones* v. *Daniel* [1894] 2 Ch. 332; 63 L. J. Ch. 562; 70 L. T. 588. See also *Crossley* v. *Maycock*, L. R. 18 Eq. 180; 43 L. J. Ch. 379.

(*g*) *Hyde* v. *Wrench*, 3 Beav. 334; 52 R. R. 144.

(*h*) *Stevenson* v. *Maclean*, 5 Q. B. D. 346; 49 L. J. Q. B. 701; 42 L. T. 897.

(*i*) *Simpson* v. *Hughes*, 66 L. J. Ch. 234; 76 L. T. 237. Here there was a complete acceptance by A of B's offer to sell land in which no time was fixed for completion. A's letter of acceptance enquired from what time B wished the purchase to date. Held, that this enquiry did not prevent his acceptance from being complete. Where no time for completion is fixed, the law implies that it must be within a reasonable time. The enquiry did not introduce a new term, but merely asked for an expression of B.'s wishes as to the date.

(*k*) *Routledge* v. *Grant*, 4 Bing. 653; 6 L. J. C. P. 166; 29 R. R. 672.

(*l*) *Hutchinson* v. *Bowker*, 5 M. & W. 535; 9 L. J. Ex. 24. See also *Jordan* v. *Norton*, 4 M. & W. 155; 7 L. J. Ex. 281; 51 R. R. 508.

(*m*) *Chinnock* v. *Marchioness of Ely*, 4 D. J. & S. 638; 146 R. R. 495; *Rossiter* v. *Miller*, 3 A. C. 1124; 48 L. J. Ch. 10; 39 L. T. 173; *Winn* v. *Bull*, 7 Ch. D. 29; 47 L. J. Ch. 139.

either may retract. And they may reserve the right not to be bound except by a formal contract. When there is a reference to a formal contract the question in each case is whether, having made a binding contract, the parties have agreed merely that its terms shall be reduced to formal shape, or whether they have agreed that there shall be no binding contract *until* the execution of a formal contract. If there is a complete agreement, to which no new terms can be added, it is none the less binding merely because the parties have agreed that it shall be more formally expressed. But if they have agreed not to be bound except by the terms of some further document, there is no contract except under that document. Thus there is no binding contract when there is an acceptance "*subject to* the preparation and approval of a formal contract" (*n*), or "*subject to* the preparation and completion of a formal contract" (*o*), or "subject to a formal contract" (*p*), or "subject to title and contract" (*q*), or "subject to suitable arrangements being made between your solicitors and mine" (*r*).

Contracts by correspondence.—Where a contract is contained in letters the whole correspondence must be looked at. If there is a definite offer, and it is accepted without qualification, and the letters of offer and acceptance cover all the terms of the

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(*n*) *Winn* v. *Bull* (*ubi supra*); followed in *Hawkesworth* v. *Chaffey*, 55 L. J. Ch. 335; 54 L. T. 72; *Watson* v. *McAllum*, 87 L. T. 547; *Santa Fé Land Co.* v. *Forestal Land Co.*, 26 T. L. R. 534.

(*o*) *Lloyd* v. *Nowell* [1895] 2 Ch. 744; 64 L. J. Ch. 744; 73 L. T. 154. See also *Chillingworth* v. *Esche*, [1924] 1 Ch. 97; 93 L. J. Ch. 129; 129 L. T. 808; 40 T. L. R. 23. But where A offers to buy a house for £350 and to "sign contract on auction particulars," and B accepts "subject to contract *as agreed*," the acceptance is complete (*Filby* v. *Hounsell* [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270).

(*p*) *Rossdale* v. *Denny*, [1921] 1 Ch. 57; 124 L. T. 294; 90 L. J. Ch. 204. Here the Court of Appeal approved of the rule laid down by Parker, J., in *Von Hatzfeldt Wildenburg* v. *Alexander*, [1912] 1 Ch., at p. 288,; 81 L. J. Ch. 184, *i.e.*, that "if the documents relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction agreed will in fact go through." In the former case there is no enforceable contract either because the condition is unfulfilled or because the Court will not enforce a contract to make a second contract *part of the terms of which are not yet agreed* (*Chillingworth* v. *Esche*, [1924] 2 Ch., at p. 114; 93 L. J. Ch. 129).

(*q*) *Coope* v. *Ridout*, [1921] 1 Ch. 291; 90 L. J. Ch. 61.

(*r*) *Lockett* v. *Norman Wright*, [1925] 2 Ch. 56; 94 L. J. Ch. 123; 132 L. T. 252.

contract which were then under negotiation, the complete contract thus arrived at cannot be affected by subsequent negotiations unless such subsequent correspondence amounts to a new contract or an agreement for rescission (*s*).

But in looking at the correspondence it may appear that it did not contain all the terms under negotiation, for earlier letters may show that there were other terms under negotiation, and letters subsequent to those which at first sight contain a complete offer and acceptance may show that those terms were still under negotiation (*t*).

Implied Contracts.—The term "implied contracts" is commonly applied to two classes of contracts, namely, (i) *inferred* or *tacit* contracts, where the offer or acceptance, or both, cannot be found in any express language of the parties, but is inferred from the conduct of the parties, and (ii) *implied* contracts and *quasi contracts*, where a contract is imputed by law. The difference between these two classes of contracts is that in the first class the existence of a contract is an inference of *fact*, drawn from the circumstances of the particular case; in the second class the contractual obligation is created by a general rule of *law* (*u*).

Inferred (tacit) contracts.—It has been seen that either an offer or an acceptance may be by conduct; and it has been laid down in general terms that "whenever circumstances arise in the ordinary course of business in which, if two persons were ordinarily honest and careful, the one of them would make a promise, it may properly be inferred that both of them understood that such a promise was given and accepted" (*x*).

The existence of a contract may often be entirely a matter of inference from the conduct of the parties. Thus, after A had

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(*s*) *Perry* v. *Suffield's, Ltd.*, [1916] 2 Ch. 187; 85 L. J. Ch. 460; 115 L. T. 4; approving the statement of the law by North, J., in *Bellamy* v. *Debenham*, 45 Ch. D. 481; 60 L. J. Ch. 166; 63 L. T. 220; and his criticisms upon observations of Kay, J., in *Bristol, etc., A. B. Co.* v. *Maggs*, 44 Ch. D. 616; 59 L. J. Ch. 472; 62 L. T. 416.

(*t*) *Hussey* v. *Horne Payne*, 4 A. C. 311; 48 L. J. Ch. 846.

(*u*) "The law *will* imply or the jury *may* infer" (*Morgan* v. *Ravey*, 6 H. & N., at p. 276; 30 L. J. Ex. 131). See also, for a further definition of implied rights and obligations, *Birmingham, etc., Banking Co.* v. *Ross*, 38 Ch. D., at p. 308; 57 L. J. Ch. 601; 59 L. T. 609.

(*x*) *Ex p. Ford, Re Chappell*, 16 Q. B. D., at p. 307; 55 L. J. Q. B. 406.

for some years supplied B with coals in varying quantities and at various prices, it was agreed between them that a contract should be entered into between them. A contract was accordingly drawn up, but was never executed by either party. Both parties, however, for some time acted upon the terms of the draft agreement. It was held that the conduct of the parties was evidence from which an inference might, as a matter of *fact*, be drawn that they had waived the execution of the contract and had agreed to act upon and be bound by the terms of the draft agreement (*y*).

Again, in commercial contracts, the presumption is that the parties contract with reference to any known usages or customs which apply to the particular transaction or business (*z*), and such usages or customs, unless expressly negatived, are "tacitly incorporated as part of their agreement" (*a*). And this tacit incorporation of a usage may negative or vary a right or obligation which otherwise would be implied by law (*b*).

So also, though no established custom applies, an agreement may be inferred from the course of dealing between the parties. Thus, for many years, a tradesman, in yearly accounts sent to his customer, charged him with interest on amounts which had been due for more than three years. The customer never objected to the interest, and from time to time made payments on account generally. It was held that these facts were evidence from which a jury could reasonably infer an agreement to pay interest (*c*).

Implied contracts and quasi contracts.—An inferred contract, as we have seen, is one which is proved by the circumstances of the particular case. An implied contract is one which is presumed by virtue of a general rule of law applicable to a parti-

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(*y*) *Brogden* v. *Metropolitan Railway*, 2 A. C. 666.

(*z*) See *Brown* v. *Byrne*, 3 E. & B. 703, at p. 715; 23 L. J. Q. B. 313; 97 R. R. 745; *Robinson* v. *Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544.

(*a*) *Mollett* v. *Robinson*, L. R. 7 C. P., at p. 103. But, as against a person who does not know of and assent to a usage, a custom cannot change the intrinsic character of a contract, though it may control its mode of performance (*Robinson* v. *Mollett*, (*ubi supra*)).

(*b*) *Mollett* v. *Robinson* (*ubi supra*), and see s. 55 of the Sale of Goods Act, 1893 (*post*, Part II., Chapter IV.).

(*c*) *Re Anglesey* (*Marquis of*), *Willmot* v. *Gardner*, [1901] 2 Ch. 548; 70 L. J. Ch. 810; 85 L. T. 175.

cular class of cases. The distinction is illustrated by a leading case (*d*), in which the issue was whether, under a contract between a manufacturer of iron plates and a customer, the former, was bound to supply iron plates of his own make. The customer tendered evidence that this was the general usage, in order to prove a tacit agreement to this effect. It was held that this evidence was admissible, but was not necessary, because the law implied a condition that the plates should be of the manufacturer's own make.

There are, as we shall see, many cases in which a contract or a term in a contract is implied either at Common Law or by statute. To give two examples, (i) at Common Law an agent impliedly warrants that he has any authority which he professes to have, and if he had not in fact the authority which he assumed he is liable to an action for breach of warranty of authority (*e*); (ii) by the Sale of Goods Act, 1893, various conditions and warranties are implied terms in certain contracts of sale (*f*).

Among implied contracts are also included *quasi contracts*, in which, however, the obligation, though it can be enforced as if it had a contractual origin, does not arise from any real contract, but depends upon a legal fiction. In certain cases in which an action of debt lay, the plaintiff, in order to avoid the technical difficulties of the action of debt, might sue in *assumpsit*, alleging a debt due to him from the defendant and a promise by the defendant to pay; such promise, however, being implied by law and not requiring any proof (*g*). There were three main classes of actions in which this use of *assumpsit* was possible, and in which an action of contract will now lie:—

i. Actions on an "account stated," that is to say, upon an admission of a sum of money being due from the defendant to the plaintiff. Such an admission formed, and still forms, a distinct cause of action (*h*).

ii. Actions for "money payable to the plaintiff for money

(*d*) *Johnson* v. *Raylton, Dixon & Co.*, 7 Q. B. D. 439; 50 L. J. Q. B. 735; 45 L. T. 374.

(*e*) Several other examples of implied contracts occur in the law of agency, *post*, Part II., Chapter I.

(*f*) *Post*, Part II., Chapter IV.

(*g*) See Bullen and Leake's Pleadings (3rd ed.), Chapter II.

(*h*) See Order XX., r. 8.

paid by the plaintiff for the defendant at his request." A request was implied whenever the plaintiff had been legally compelled to pay, or being legally compellable had paid, a debt for which the defendant was liable (*i*). Thus, where one of several co-debtors, or co-sureties, paid the whole debt, he could in this form of action recover contribution from the other debtors or sureties (*k*).

iii. Actions for "money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff." This action lay, and still lies, whenever the defendant has received money which *ex æquo et bono* belongs to the plaintiff (*l*), as, for example, for profits made by an agent in the course of his employment, without the sanction of his principal (*m*), or for money paid upon a consideration which *wholly* failed (*n*), *e.g.*, money paid under a mistake of fact (*o*), or for money paid to recover property unlawfully seized or detained (*p*). And, as

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(*i*) See *Moule* v. *Garrett*, L. R. 7 Ex. 101; 41 L. J. Ex. 62; 26 L. T. 367; *Roberts* v. *Crowe*, L. R. 7 C. P. 629; 41 L. J. C. P. 198; 27 L. T. 238; *Edmund* v. *Wallingford*, 17 Q. B. D. 811; 54 L. J. Q. B. 305; 52 L. T. 720; *Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452; 67 L. T. 684.

(*k*) *Kemp* v. *Finden*, 12 M. & W. 421; 13 L. J. Ex. 137; 67 R. R. 384; *Batard* v. *Hawes*, 2 E. & B. 287; 22 L. J. Q. B. 443; 95 R. R. 550.

(*l*) *Leslie, Ltd.* v. *Shiell*, [1914] 3 K. B., at p. 626; 83 L. J. K. B. 1145; 111 L. T. 106; 30 T. L. R. 460.

(*m*) *Morison* v. *Thompson*, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; 30 L. T. 869.

(*n*) *Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 140; cp. *Straton* v. *Rastall*, 2 T. R. 366; *Woodland* v. *Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202; 110 R. R. 707 (money paid for a worthless cheque).

(*o*) *Huddersfield Banking Co.* v. *Lister*, [1895] 2 Ch., at p. 281; 64 L. J. Ch. 523.

(*p*) See *Atlee* v. *Backhouse*, 3 M. & W. 633; 137 R. R. 98. The subject of quasi contracts was considered by the House of Lords in the case of *Sinclair* v. *Brougham*, [1914] A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 30 T. L. R. 315, in which it was pointed out that a fiction can be set up only where a contract would be valid if it really existed and not where substantive law, as distinguished from that of procedure, makes the defendant incapable of making the contract. Where, therefore, money is lent to a company under a contract which is *ultra vires* the company, the lenders cannot recover money paid by them on the ground that it is money had and received by the company to their use, because the implied promise on which the action for money had and received would be based would be precisely that promise which the company could not lawfully make. So also, where an infant obtains a loan by fraudulently misrepresenting his age, an action for money had and received cannot be

a general rule, whenever the defendant has wrongfully obtained the money of the plaintiff, or has wrongfully obtained the goods of the plaintiff and converted them into money, the plaintiff may waive the tort and claim the money as received to his use (*q*).

It may also be noted that in certain cases a *quasi contract of sale* arises. Thus, where the defendant has wrongfully detained or converted the goods of the plaintiff, the latter may elect to waive the tort and claim the value of the goods in an action for goods sold and delivered (*r*). And in an action for trespass to, or conversion or detention of, goods, where the plaintiff recovers the full value of the goods as damages and *the defendant satisfies the judgment*, the plaintiff "by a kind of involuntary sale" loses his property in the goods (*s*). So also, when necessaries are supplied to a person who by reason of disability cannot contract, the law implies an obligation on the part of such person to pay a reasonable price for such necessaries out of his own property, provided that in the particular case the necessaries are supplied under circumstances which justify the Court in implying that obligation (*t*).

Construction of Documents.

The following are the principal rules governing the construction of documents:—

1. *The construction of documents is, as a general rule, for the Court.*—But, if there is a question whether a word was used in a

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brought against him, because his express promise to repay the money would, by the Infants Relief Act, 1874, be absolutely void (*Leslie, Ltd.* v. *Shiell* (*ubi supra*)). In the case of *Sinclair* v. *Brougham* it was stated that the action for money had and received cannot now be extended beyond the principles illustrated in the decided cases.

(*q*) *Holt* v. *Ely*, 1 E. & B. 795; 93 R. R. 398 (money); *Oughton* v. *Seppings*, 1 B. & Ad. 241; 8 L. J. K. B. 393; 35 R. R. 284 (goods); see also Bullen and Leake (3rd ed.), pp. 47, 48.

(*r*) *Russell* v. *Bell*, 10 M. & W. 340; 62 R. R. 639. A person who has elected to waive a tort cannot both approbate and reprobate and therefore cannot subsequently claim damages from anyone in respect of the tort (*Verschures Creameries* v. *Hull, etc., S.S. Co.*, [1921] 2 K. B. 608; 125 L. T. 165; 91 L. J. K. B. 39).

(*s*) *Ex p. Drake*, 5 Ch. D., at p. 871; 46 L. J. Bk. 105; 36 L. T. 677: cp. *Brinsmead* v. *Harrison*, L. R. 7 C. P., at p. 588; 41 L. J. C. P. 190; 27 L. T. 99.

(*t*) *Re Rhodes*, 44 Ch. D. 94; 59 L. J. Ch. 298; 62 L. T. 342.

sense peculiar to a trade, business, or place, the jury must first say whether the parties used it in that peculiar sense; the meaning of technical words must also be left to the jury (*u*). Accordingly, if a contract is wholly in writing, its effect must be determined entirely by the Court, unless there is any evidence that its words have some special or technical meaning (*x*). But if the contract is oral, or partly oral and partly in writing, its effect as a whole becomes a question for the jury, which must, however, take from the Court the construction of any documents (*y*).

2. *A contract must be construed according to the law of the country where it was made unless the contrary appears to have been the intention of the parties.* Where a contract made in one country has to be performed in another country an inference may arise that the law of the place of performance was intended to govern the obligations of the parties (*z*), but this inference may be rebutted by other circumstances (*a*); " and all the cases come to this, that you cannot lay down any distinct positive rule as to what will be the governing law, but you must consider, having regard to the nature of the contract and all the other circumstances, by what law the contract is to be governed " (*b*).

" Where a contract is entered into between parties residing in different places, it is a question . . . in each case, with reference to what law the parties contracted . . . the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract " (*c*).

(*u*) *Simpson* v. *Margetson*, 11 Q. B., at p. 31; 17 L. J. Q. B. 81; 75 R. R. 278. Cited and approved in *Bruner* v. *Moore*, [1904] 1 Ch. 305; 73 L. J. Ch. 377.

(*x*) *Bowes* v. *Shand*, 2 A. C. 455; 46 L. J. Q. B. 561; 36 L. T. 857; *Morrell* v. *Frith*, 3 M. & W. 402; 7 L. J. Ex. 172; 49 R. R. 659.

(*y*) *Bolckow* v. *Seymour*, 17 C. B. (N.S.) 107; 142 R. R. 272.

(*z*) *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D., at pp. 600, 601; 53 L. J. Q. B. 156; 50 L. T. 194; *Benaim & Co.* v. *Debono*, [1924] A. C. 514; 93 L. J. P. C. 133; 131 L. T. 1.

(*a*) *Jacobs* v. *Crédit Lyonnais* (*ubi supra*).

(*b*) *Re Missouri Steamship Co.*, 42 Ch. D., at p. 338; 58 L. J. Ch. 721; 61 L. T. 316. See also *British South Africa Co.* v. *De Beers, Ltd.*, [1910] 2 Ch. 502; 80 L. J. Ch. 65; 103 L. T. 4; *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, [1920] 2 K. B. 287; 89 L. J. K. B. 999; 123 L. T. 375; 36 T. L. R. 456; *Jones* v. *Oceanic Steam Navigation Co.*, [1924] 2 K. B. 730; 93 L. J. K. B. 1053; 40 T. L. R. 847.

(*c*) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A. C., at pp. 207, 208; 72 L. T. 1.

In contracts of affreightment, unless the contract expressly provides otherwise, the law which governs is the law of the country to which the carrying ship belongs (*d*).

But, though the point does not strictly relate to the construction of contracts, it may be noted that, where a contract governed by foreign law is sought to be enforced in this country, the *procedure* is regulated by English law. Thus, by s. 4 of the Statute of Frauds, it is provided that "*No action shall be brought*" in respect of certain contracts, unless the agreement or some note or memorandum thereof is in writing. This statute simply regulates procedure by requiring a certain kind of evidence, and accordingly, though a verbal contract, made in and governed by the law of a foreign country, may be valid and enforceable in that country, it cannot be enforced in this country in default of the evidence required in English Courts (*e*). So also the English Statutes of Limitations regulate the time within which *any* action can be brought in English Courts (*f*).

3. It must be construed *according to the real intent of the parties*, to be collected from the language they have used, greater regard being paid to the clear intent of the parties than to any particular words which they may have used in the expression of their intent (*g*).

4. The construction must be *upon the document as a whole*, effect being given, as far as possible, to every word used (*h*). The document "must be read as a whole in order to ascertain the true meaning of its several clauses and . . . the words of each clause should be interpreted so as to bring them into harmony with the other provisions . . . if that interpretation

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(*d*) *Lloyd* v. *Guibert*, L. R. 1 Q. B. 115; 35 L. J. Q. B. 74; 13 L. T. 602.
(*e*) *Leroux* v. *Brown*, 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889.
(*f*) *Harris* v. *Quine*, L. R. 4 Q. B. 653; 38 L. J. Q. B. 331; 20 L. T. 947.
(*g*) *Ford* v. *Beech*, 11 Q. B., at p. 866; 17 L. J. Q. B. 114; *Coddington* v. *Palaeologo*, L. R. 2 Ex., at pp. 198, 200; 36 L. J. Ex. 73; 15 L. T. 581.
(*h*) *Rose & Frank Co.* v. *Crompton & Brothers*, [1923] 2 K. B., at p. 287; 92 L. J. K. B. 959; 129 L. T. 610; *Coddington* v. *Palaeologo*, L. R. 2 Ex., at p. 198; 36 L. J. Ex. 73; *Laird* v. *Briggs*, 19 Ch. D. 22; 50 L. J. Ch. 260; 45 L. T. 238; *Baddeley* v. *Consolidated Bank*, 38 Ch. D. 238; 57 L. J. Ch. 468 (where an agreement is made for sharing the profits of a business, the agreement must be looked to as a whole in order to determine whether a partnership is created thereby).

does no violence to the meaning of which they are naturally susceptible" (*i*).

In the case of *inconsistency* between different clauses of a document, the following are some of the principal rules which apply:—

In a deed, if the recitals are clear and the operative part is ambiguous, the recitals control the operative part and govern the construction; if the recitals are ambiguous and the operative part is clear, the operative words must prevail; if the operative part and the recitals are both clear but are inconsistent with each other, the operative part must prevail (*k*).

In documents other than wills, if there are two inconsistent clauses the former usually prevails (*l*). General words are, however, usually controlled by subsequent special provisions (*m*). And where, as in policies of assurance, the document is a printed form in which the special provisions of the particular contract have been filled up in writing, if there is any doubt as to the construction of the whole document, the words added in writing must have a greater effect attributed to them than to the printed words (*n*).

But *falsa demonstratio non nocet*. That is to say, if there is in a document an adequate and *complete* description or definition of the subject-matter to which it is intended to apply, that description will not be affected or vitiated by a subsequent reference to the subject-matter containing *additional* but *erroneous* words of description as distinct from words *limiting* the generality of the former description (*o*).

The *ejusdem generis rule*.—Where particular words of description are followed by a general term, the meaning of the latter will not be extended beyond objects of the same classes as those enumerated by the preceding particular words. Thus, where a lease contained a provision for abatement of the rent if the demised premises should be destroyed by "fire, flood, storm, tempest, *or other inevitable accident*," it was held that these

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(*i*) *North Eastern Railway Co.* v. *Hastings*, [1900] A. C., at p. 267; 69 L. J. Ch. 516; 82 L. T. 217; 15 T. L. R. 247.

(*k*) *Ex p. Dawes, re Moon*, 17 Q. B. D., at pp. 286, 289; 55 L. T. 114; 3 Morrell 105.

(*l*) *Williams* v. *Hathaway*, 6 Ch. D. 544; *Forbes* v. *Git*, [1922] 1 A. C., at p. 259; 91 L. J. P. C. 97; 126 L. T. 616. *The contrary is the rule in the case of a will: Rose & Frank Co.* v. *Crompton & Brothers* (*ubi supra*).

(*m*) See *Edward* v. *Rees*, 7 C. & P. 340.

(*n*) *Robertson* v. *French*, 4 East, at p. 135; 7 R. R. 535. Cited and approved in *Glyn* v. *Margetson*, [1891] A. C., at p. 358; 62 L. J. Q. B. 466.

(*o*) For a full explanation of this maxim, see *Webber* v. *Stanley*, 16 C. B. (N.S.) 698; 33 L. J. C. P. 217; 139 R. R. 672; and *Smith* v. *Ridgway*, L. R. 1 Ex. 331; 35 L. J. Ex. 11, 198; 143 R. R. 472, 789.

last words were limited to accidents similar to fire, flood, storm, or tempest (*p*).

5. The construction must be *reasonable*. Thus, where A covenanted to pay money "immediately upon demand," it was held that the word "immediately" must receive a reasonable construction so as to allow A to have a reasonable time for procuring or fetching the money (*q*).

6. The construction must be *liberal*, *i.e.*, the language must be given its most comprehensive meaning, unless there is something to show that it was used in a limited sense. Thus the word "men" in a contract may include both men and women (*r*).

7. The construction must be *favourable: Ut res magis valeat quam pereat* (*s*). "An instrument ought not to be construed in such a way as to render it, to the knowledge of both parties, wholly inoperative" (*t*). And "where a clause is ambiguous, a construction which will make it valid is to be preferred to one which will make it void" (*u*).

8. The construction must be, so far as it properly may, *against a grantor or promisor* and in favour of a grantee or promisee (*x*). Thus, an agreement to guarantee the payment of goods up to £200 has been held to be a continuing guarantee and not a guarantee limited to one particular delivery of goods (*y*).

(*p*) *Saner* v. *Bilton*, 7 Ch. D. 815; 47 L. J. Ch. 267; 38 L. T. 821. See also the full explanation of the rule in *S.S. Magnhild* v. *McIntyre Brothers*, [1920] 3 K. B. 321; 89 L. J. K. B. 1110; 36 T. L. R. 744; affirmed, [1921] 2 K. B. 97; 90 L. J. K. B. 527; 124 L. T. 771; 37 T. L. R. 413. But *initial* general words are not cut down by *subsequent* specific words (*Ambatielos* v. *Anton Jurgens Margarine Works*, [1923] A. C. 175; 92 L. J. K. B. 306; 128 L. T. 417; 39 T. L. R. 106).

(*q*) *Toms* v. *Wilson*, 4 B. & S. 442; 32 L. J. Q. B. 33, 382; 129 R. R. 799, 806. See also *Brighty* v. *Norton*, 3 B. & S. 305; 32 L. J. Q. B. 38; 129 R. R. 327; *Massey* v. *Sladen*, L. R. 4 Ex. 13; 38 L. J. Ex. 34; *Capper* v. *Wallace*, 5 Q. B. D. 163; 49 L. J. Q. B. 350.

(*r*) As to the liberal construction of certain words in statutes, see the Interpretation Act, 1889 (52 & 53 Vict. c. 63). By s. 61 of the Law of Property Act, 1925, it is provided that in all deeds, contracts and other instruments executed, made or coming into operation after 1925, the singular includes the plural and *vice versa*, and the masculine includes the feminine and *vice versa*.

(*s*) *Roe* v. *Traumarr*, Willes, 632.

(*t*) *Butterley Co., Ltd.* v. *New Hucknall Colliery Co., Ltd.*, [1909] 1 Ch., at p. 46; 78 L. J. Ch. 63; 25 T. L. R. 45.

(*u*) *North Eastern Railway Co.* v. *Hastings*, [1900] A. C., at p. 270; 69 L. J. Ch. 516.

(*x*) *Neill* v. *Devonshire* (*Duke of*), 8 A. C., at p. 149; 31 W. R. 622.

(*y*) *Hargrave* v. *Smee*, 6 Bing. 244; 8 L. J. C. P. 46; 31 R. R. 407.

This rule of construction does not, however, apply to Crown grants, in the case of which the construction is against the grantee (*z*).

9. A document, if plain and unambiguous, must be construed according to the primary, natural, and grammatical meaning of the terms used, unless either (i) they have by any custom or usage acquired some particular meaning, or (ii) the context shows that they must be understood in some particular sense (*a*).

As to this rule the following points may be noted:—

Expressum facit cessare tacitum.—It has been already pointed out that in commercial contracts the parties are deemed to contract with reference to known usages and customs; evidence of such usages is therefore admissible to construe the contract. But the evidence must not be of a particular meaning which is "repugnant to, or inconsistent with the written contract" (*b*).

Words which have a *technical legal meaning* must be given that meaning (*c*) unless the context clearly shows that they were intended to have some other meaning (*d*). "Words denoting *weight, or measure, or number,* must . . . be understood in their ordinary sense, unless some specific meaning be prescribed to them by statute, or given by custom" (*e*).

Time.—When a contract is made "from" a certain date "until" a certain date, "in general the day on which the engagement is entered into is excluded and the last day of the term is included" (*f*). But "it is impossible to lay down any fixed

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(*z*) *Eastern Archipelago Co.* v. *Reg.*, 2 E. & B. 856; 23 L. J. Q. B. 82; *Viscountess Rhondda's Claim*, [1922] 2 A. C., at p. 353.

(*a*) See *Mallan* v. *May*, 13 M. & W., at p. 517; 12 L. J. Ex. 376; 14 L. J. Ex. 48; 63 R. R. 708; 67 R. R. 707; *Coddington* v. *Palaeologo*, L. R. 2 Ex., at p. 197; 36 L. J. Ex. 73; *McCowan* v. *Baine*, [1891] A. C., at p. 408; 65 L. T. 502; *Glyn* v. *Margetson & Co.*, [1893] A. C., at p. 358; 62 L. J. Q. B. 466; 69 L. T. 1; *North Eastern Railway Co.* v. *Hastings*, [1900] A. C., at p. 263; 69 L. J. Ch. 516.

(*b*) *Brown* v. *Byrne*, 3 E. & B., at pp. 715, 716; 23 L. J. Q. B. 313; 97 R. R. 745; *Palgrave, Brown & Son, Ltd.* v. *Owners of S.S. Turid*, [1921] 1 A. C. 397; 91 L. J. P. 81; 127 L. T. 42; 38 T. L. R. 423. See also *ante*, p. 47.

(*c*) *Leach* v. *Jay*, 9 Ch. D. 42; 47 L. J. Ch. 876; 39 L .T. 242; *Re Gibbs*, [1907] 1 Ch. 465; 76 L. J. Ch. 238; 96 L. T. 423.

(*d*) *Smyth* v. *Smyth*, 8 Ch. D. 561; 38 L. T. 633; *Hale* v. *Hale*, [1892] 1 Ch. 361; 61 L. J. Ch. 289; 66 L. T. 206.

(*e*) *Smith* v. *Wilson*, 3 B. & Ad., at p. 734; 1 L. J. K. B. 194; 37 R. R. 536.

(*f*) *Isaacs* v. *Royal Insurance Co.*, L. R. 5 Ex., at p. 300; 39 L. J. Ex. 189: cp. *South Staffordshire Tramways Co.* v. *Sickness & Accident Assurance Association*, [1891] 1 Q. B. 402; 60 L. J. Q. B. 47; 63 L. T. 807. But see *Wilkinson* v. *Gaston*, 9 Q. B. 137; 15 L. J. Q. B. 339; 72 R. R. 198; where "from," in a contract of service, was held to include the first day.

rule . . . each case must depend on its own circumstances and subject-matter" (*g*). So, also, the word "on" or "upon" may mean either "before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter" (*h*).

The primary meaning of the word "month" is lunar month (*i*). There are, however, many cases in which the term "month" means a calendar month, *e.g.*, (i) in ecclesiastical documents; (ii) in mortgages; (iii) in cases where the context or the nature of the circumstances require the meaning of calendar month; (iv) where by mercantile usage or by some custom (as in the case of notice to domestic servants) it has the meaning of calendar month (*k*); (v) (*prima facie*) in contracts for the sale of goods (*l*); (vi) in bills of exchange, promissory notes and cheques (*m*), in every Act passed after 1850, unless the contrary intention appears (*n*); (vii) by s. 61 of the *Law of Property Act*, 1925, in all deeds, contracts, and instruments executed, made or coming into operation after 1925, unless the context otherwise requires.

When a contract is to be completed by a certain day, the Common Law rule was that time was of the essence of the contract; but in Equity it was never so, unless expressly so stipulated, either at the time of the contract, or by notice given afterwards, or it appeared to be so intended from the nature of the property, *e.g.*, where a reversion was being sold, as it might at any moment, through the falling in of the life-estate, become an estate in possession. But by s. 41 of the *Law of Property Act*, 1925 (replacing a similar provision of the Judicature Act, 1873 (*o*)), it is provided that stipulations in a contract as to time, which according to rules of Equity are

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(*g*) L. R. 5 Ex., at p. 299.

(*h*) *R.* v. *Humphery*, 10 Ad. & E., at p. 369; 50 R. R. 418; cited and followed in *Paynter* v. *James*, L. R. 2 C. P., at p. 354.

(*i*) *Phipps & Co.* v. *Rogers*, [1925] 2 K. B. 14; 93 L. J. K. B. 1009; 132 L. T. 240.

(*k*) As to (i), (ii), (iii), (iv) see *Phipps & Co.* v. *Rogers* (*ubi supra*). There is no general exception in making it mean calendar month in all mercantile or commercial documents, and "if any such exception be set up it must be proved in each case (unless judicially recognised) as a customary usage in the particular trade or place." *Bruner* v. *Moore*, [1904] 1 Ch., at p. 311; 73 L. J. Ch. 377; 87 L. T. 728. The custom by which in all mercantile transactions in the City of London a month means calendar month has been judicially recognised. *Id.*

(*l*) Sale of Goods Act, 1893, s. 10 (2), *post*, Part II., Chapter IV.

(*m*) Bills of Exchange Act, 1882, s. 14 (4).

(*n*) Interpretation Act, 1889, s. 3.

(*o*) S. 25 (7). See Wilshere's Equity, Chapter XIII.

not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with the same rules. In mercantile transactions, however stipulations as to time are of the essence of the contract (*p*), except in contracts for the sale of goods which are governed by special statutory rules (*q*).

Section 2.—*Consideration.*

Consideration is "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other" (*r*).

It has for many years been settled law that consideration is necessary for every simple contract, even though it is in writing. There is no intermediate class of contracts between specialty contracts and simple contracts; "if [contracts] be merely written and not specialties, they are parol and consideration must be proved" (*s*).

In some respects, however, the rules as to consideration do not apply to negotiable instruments, which are governed by principles of the law merchant that existed before the doctrine of consideration had developed. Thus, a party to a bill of exchange or promissory note may be liable on the instrument, although he has received no consideration and the plaintiff has given none.

The origin of the doctrine of consideration, and its basis on either benefit to the promisor or detriment to the promisee, has already been considered. This double aspect of consideration is illustrated by the case of *Carlill* v. *Carbolic Smoke Ball Co.* (*t*), in which it was argued that there was no consideration for the promise of the defendants. But it was held that there were two answers to this argument. "It is quite obvious that, in the view of the advertisers, a use by the public of their remedy . . . will react and produce a sale which is directly

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(*p*) *Reuter* v. *Sala*, 4 C. P. D. 249; 48 L. J. Q. B. 492; *Hartley* v. *Hymans*, [1920] 3 K. B., at pp. 483, 484; 90 L. J. K. B. 14; 124 L. T. 31; 36 T. L. R. 805.

(*q*) Sale of Goods Act, 1893, s. 10 (1), see *post*, Part II., Chapter IV.

(*r*) *Currie* v. *Misa*, L. R. 10 Ex., at p. 162; 44 L. J. Ex. 94.

(*s*) *Rann* v. *Hughes*, 7 T. R. 350, n.; 53 R. R. 262.

(*t*) *Ante*, p. 36.

beneficial to them. Therefore the advertisers get out of the use an *advantage* which is enough to constitute a consideration. But there is another view . . . is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertisers? . . . it appears to me that there is a distinct inconvenience, not to say a *detriment*, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise " (*u*).

The principal points to be remembered with regard to consideration are (1) that it must move from the promisee; (2) that a past consideration is not sufficient to support a subsequent promise; (3) that consideration must be of some legal value.

1. *Consideration must move from* (*i.e.*, *must be furnished by*) *the promisee.*—In the case of *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.* it was said by Lord Haldane: " In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quæsitum tertio* arising by way of *contract*. Such a right may be conferred by way of *property*, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that, if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request " (*x*).

In this case X & Co. contracted to purchase a certain quantity of the plaintiffs' goods, and agreed not to sell them at less than the plaintiffs' list prices, and on any sale to obtain from the sub-purchaser a similar undertaking. X & Co. sold to the defendants, and obtained from them an undertaking, by which they agreed not to sell below the plaintiffs' list prices and to pay a penalty *to the plaintiffs* for any breach of the agreement. In breach of this undertaking the defendants sold below the list prices. It was held that, as no consideration moved from the

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(*u*) *Id.*, *per* Lindley, L.J., [1893] 1 Q. B., at pp. 264, 265. For another instance, see *Bainbridge* v. *Firmstone*, *post*, p. 63. See also *De la Bere* v. *Pearson*, [1908] 1 K. B. 280; 77 L. J. K. B. 380.

(*x*) [1915] A. C., at p. 853; 84 L. J. K. B. 1680; 113 L. T. 386; 31 T. L. R. 399.

plaintiffs to the defendants, they could not maintain an action against them for breach of contract.

It was formerly thought that, where a parent contracted for the benefit of his child, the nearness of the relationship would give the child the benefit of consideration performed by the parent, and enable the child to maintain an action upon the contract. But it was settled by the case of *Tweddle* v. *Atkinson* (*y*) that "no stranger to the consideration can take advantage of a contract, though made for his benefit," unless there is a provision in an Act of Parliament enabling him to sue (*z*), or one of the parties to the contract contracts as the nominee or trustee of a third person (*a*). But the benefit of a contract may be *assigned* to a third party (*b*).

2. *Past consideration is not sufficient to support a simple contract.*—Consideration may be either *executed* or *executory*: it is executed when it is an act; it is executory when it is merely a promise (*c*).

There is *executed consideration* for a promise when, *in the act which constitutes his offer or his acceptance*, one party to the contract has done all that he was bound to do under the contract (*d*).

Thus, if A offers to pay a reward for the doing of an act by B, the doing of the act is an acceptance which turns A's offer into a promise, and is at the same time an executed consideration supporting his promise. Conversely, if A sends goods to B under such circumstances as to create an offer of the goods, and B

(*y*) 1 B. & S. 393; 30 L. J. Q. B. 265; 124 R. R. 610; cp. *Eley* v. *Positive Assurance Co.*, 1 Ex. D. 20; 45 L. J. Ex. 451; 34 L. T. 190.

(*z*) *Re Rotherham Alum and Chemical Co.*, 25 Ch. D., at p. 111; 53 L. J. Ch. 290.

(*a*) *Re Empress Engineering Co.*, 16 Ch. D., at p. 129; 43 L. T. 742; cp. *Gandy* v. *Gandy*, 30 Ch. D. 57; 54 L. J. Ch. 1154; 53 L. T. 306; *Les Affreteurs Réunis Société Anonyme* v. *Leopold Walford, Ltd.*, [1919] A. C. 801; 88 L. J. K. B. 861; 35 T. L. R. 542; *French & Co.* v. *Leeston Shipping Co.*, [1922] 1 A. C. 451; 91 L. J. K. B. 655; 127 L. T. 169; 38 T. L. R. 459.

(*b*) *Post*, Chapter VI.

(*c*) It should be noted that where there are reciprocal promises, it is the promise, and not its fulfilment, that is the consideration (*Nichols* v. *Raynbred*, Hobart, 88; *Stewart* v. *Casey*, [1892] 1 Ch., at p. 115; 61 L. J. Ch. 61; 65 L. T. 40); but the promises must be made concurrently or else they are both *nuda pacta*; *Nichols* v. *Raynbred* (*ubi supra*), and see *Thornton* v. *Jenyns*, 1 Man. & G. 166; 9 L. J. C. P. 265.

(*d*) Anson's Contracts, Part II., Chapter I., § 2.

accepts the goods, the consideration for an express or implied promise by B to pay for the goods is their delivery by A (*e*).

But the promise must be given *in exchange* for the consideration; it must be "the price for which the promise of the other is bought" (*f*), and must be "connected therewith in one contract" (*g*). A consideration which is *wholly past and bygone* will not sustain a subsequent promise unless it was rendered at the request of the promisor *and* under such circumstances that, even in the absence of an express promise, the law will imply a promise. Both these elements must exist; services rendered without a request, express or implied, cannot amount to consideration for a subsequent promise (*h*), nor can they do so even although rendered upon request, unless they are of such a nature or rendered under such circumstances that the law would imply a promise to pay for them (*i*). Acceptance of the consideration may raise a presumption that a request was made, but this, like any other presumption, may be rebutted (*k*), and will not arise if the defendant had no opportunity of rejecting the benefit of the consideration (*l*).

If the circumstances are such that a promise would be implied (*m*), a subsequent express promise may be treated "either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration *on the faith of which* the service was originally rendered" (*n*).

Where there is a contract based on an executed consideration that consideration will not support an express promise, made after the contract, which could not in the first instance have been implied. Thus, in the case of *Roscorla* v. *Thomas* (*o*), A

(*e*) *Hart* v. *Mills*, 15 M. & W. 87; 15 L. J. Ex. 200; 71 R. R. 578.
(*f*) *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] A. C., at p. 855; 84 L. J. K. B. 1680.
(*g*) *Kennedy* v. *Broun*, 13 C. B. (N.S.), at p. 739; 32 L. J. C. P. 137; 134 R. R. 396.
(*h*) *Re Bodega Co.*, [1904] 1 Ch., at p. 287; 73 L. J. Ch. 198; 89 L. T. 694.
(*i*) *Kennedy* v. *Broun* (*ubi supra*).
(*k*) *Re Bodega Co.* (*ubi supra*).
(*l*) *Taylor* v. *Laird*, 25 L. J. Ex. 329, *ante*, p. 37.
(*m*) *Roscorla* v. *Thomas*, 3 Q. B., at p. 237; 11 L. J. Q. B. 214; 61 R. R. 216.
(*n*) *Stewart* v. *Casey*, [1892] 1 Ch., at p. 116; 65 L. T. 40; 61 L. J. Ch. 61.
(*o*) 3 Q. B. 234. See also *Hopkins* v. *Logan*, 5 M. & W. 247; 8 L. J. Ex. 218; 52 R. R. 704.

sold a horse to B without giving any warranty. After the contract A, in consideration of B's purchase, warranted that the horse was sound. It was held that no action would lie upon this warranty. From the consideration of the purchase the only promise that could be implied was a promise to deliver the horse upon request; no warranty could be implied, and therefore none could be supported by a subsequent express promise.

From the rule that past consideration is insufficient, it follows that a mere moral obligation is no consideration. Thus, in *Eastwood* v. *Kenyon* (*p*), the plaintiff, being guardian and agent of an unmarried lady, who was an infant, voluntarily spent his own money on improvement of her property, and, to repay himself, borrowed money from B. After the lady's marriage her husband, who by his marriage had received the benefit of the expenditure, expressly promised the plaintiff that he would pay the amount that was due to B, and on that promise was sued by the plaintiff. It was held that the action would not lie, since the facts showed nothing but a past consideration conferred voluntarily by the plaintiff without any request by the defendant: it was also pointed out that, if a mere moral obligation amounted to sufficient consideration for a subsequent promise, this "would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it" (*q*).

The same point was, however, subsequently raised in the case of *Beaumont* v. *Reeve* (*r*), where the plaintiff alleged that the defendant had seduced her and had thereby caused her damage, and that in consideration thereof he had promised to pay her a sum of money. It was again laid down by the Court that "a precedent moral obligation, not capable of creating an original cause of action, will not support an express promise"; the seduction created merely a moral obligation towards the plaintiff, and gave her no right of action, and therefore created no legal liability from which a consideration could arise (*s*).

(*p*) 11 Ad. & E. 438; 9 L. J. Q. B. 409; 52 R. R. 400.
(*q*) 11 Ad. & E., at p. 449.
(*r*) 8 Q. B. 483; 15 L. J. Q. B. 141; 70 R. R. 552.
(*s*) This must not be confused with a promise by a man to pay a sum to the mother of his illegitimate child for her support, for this is perfectly valid; as a mother by undertaking the entire support of such child does more than

But there is one class of exceptions to the rule that a past consideration will not support a subsequent promise (*t*).

Where the consideration for a contract has been executed, but the promisor is protected from legal liability by some rule of law made for his benefit, a subsequent promise made after the rule of law has ceased to operate can revive the previous consideration (*u*). Thus, before the Infants' Relief Act, 1874, a person of full age was liable for goods supplied during infancy on an account stated during infancy and ratified after full age. But this rule applies only when the consideration is executed and when the contract is valid, though unenforceable; not when the consideration is executory, or when the contract is illegal or void (*x*). And, similarly, a subsequent express promise can revive a promise which was originally made for valuable consideration, but has become barred by the Statute of Limitations (*y*). But this principle does not now apply to a debt from which a bankrupt is released by his order of discharge, for no subsequent promise to pay such a debt can be enforced unless supported by a new consideration (*z*).

3. *Consideration must be of some legal value.*—"Consideration means something which is of some value in the eyes of the law" (*a*). In other words, the consideration which is required to support a simple contract means *valuable consideration* as distinct from good consideration; "natural love and affection are

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by law she is bound to do, and this forms a sufficient consideration for the promise: *Smith* v. *Roche*, 28 L. J. C. P. 237.

(*t*) It is sometimes stated that there is another exception to the rule, namely, where the plaintiff *voluntarily* does something that the defendant was legally compellable to do, and the defendant in consideration thereof subsequently promises to pay. The authority for this rule is, however, unsatisfactory. As to the *implied* contract arising where the plaintiff is compelled to do that which the defendant was legally compellable to do, see *ante*, pp. 48, 49.

(*u*) See *Earle* v. *Oliver*, 2 Ex. 90; *Wennall* v. *Adney*, 3 B. & P. 249 (note); 6 R. R. 780; *Eastwood* v. *Kenyon*, 11 Ad. & E., at pp. 446, 447. *Beaumont* v. *Reeve*, 8 Q. B., at p. 487 ("an express promise cannot be supported by a consideration from which the law could not imply a promise except where the express promise does away with a legal suspension or bar of a right of action which, *but for such suspense or bar*, would be valid").

(*x*) *Joseph Evans & Co.* v. *Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 593; 118 L. T. 556; 34 T. L. R. 247.

(*y*) *Post*, Chapter VI.

(*z*) *Jakeman* v. *Cook*, 4 Ex. D. 26; 48 L. J. Ex. 165. Before 1850 such a subsequent promise was binding without any new consideration.

(*a*) *Thomas* v. *Thomas*, 2 Q. B., at p. 859; 11 L. J. Q. B. 104; 90 R. R. 903.

not a sufficient consideration whereon an action of *assumpsit* may be founded" (*b*).

Neither motive nor moral obligation constitutes consideration. Thus, in *Thomas* v. *Thomas* (*c*), the defendant was an executor of J. T., who, immediately before his death, verbally expressed his wishes to make certain provisions for his wife E. T. After the death of J. T. the defendant entered into a written agreement with E. T., by which he agreed "in consideration of such desire" of J. T. to carry out these provisions. It was held that "motive is not the same thing with consideration"; to hold that mere respect for the wishes of the deceased was consideration would be confounding consideration with motive.

As a general rule, and subject to exceptions to be noted, the adequacy of the consideration is immaterial; "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced" (*d*). Thus, in *Bainbridge* v. *Firmstone* (*e*), the pleading of the plaintiff stated that, in consideration that the plaintiff, at the request of the defendant, had consented to allow the defendant to weigh two boilers, the defendant promised to return them in as good a condition as when lent, but failed to do so. It was held that there was sufficient consideration for the defendant's promise, the reason being expressed as follows:— "The defendant had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not enquire what benefit he expected to derive" (*per* Lord Denman, C.J.). "The consideration is that the plaintiff, at the defendant's request, had consented to allow the defendant to weigh the boilers. I suppose that the defendant thought he had some benefit; at any rate, there is a detriment to the plaintiff from his parting with the possession for even so short a time" (*per* Patteson, J.).

Again, in the case of *Haigh* v. *Brooks* (*f*), the consideration

(*b*) *Tweddle* v. *Atkinson*, 1 B. & S., at p. 399; 30 L. J. Q. B. 265; 124 R. R. 610.

(*c*) 2 Q. B. 851. As to moral obligation, see *Eastwood* v. *Kenyon*, *ante*, p. 61.

(*d*) *Bolton* v. *Madden*, L. R. 9 Q. B. 56; 43 L. J. Q. B. 35; 29 L. T. 505.

(*e*) 8 Ad. & E. 743; 53 R. R. 234. (*f*) 10 Ad. & E. 309; 50 R. R. 399.

for the promise by the defendant was the surrender to him of a document which purported to be a guarantee. The defence was that there was no consideration, because the guarantee did not comply with the provisions of the Statute of Frauds, and was therefore unenforceable. It was held that the surrender was nevertheless a valuable consideration. "The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he wanted by means of that promise . . . how can the defendant be justified in breaking this promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it?" (*g*).

But *inadequacy of consideration may be material*—

i. In cases within the *Money-lenders Act*, 1900.

ii. Where it may be *evidence* of fraud (*h*).

Although, however, consideration need not, in general, be adequate, yet it must be *real*, *i.e.*, of *some* value. Thus there is no consideration if a man promises to do something which is obviously impossible, either physically and naturally (*i*), or legally (*k*). So, also, there is no consideration if the promise *can* be of no legal value, as, *e.g.*, a promise to surrender a lease at will, which the lessor can determine at any time (*l*); for the same reason the payment of part of a judgment debt cannot alone be any consideration for a promise by the creditor (not under seal) not to take any proceedings on the judgment, because it is apparent that the creditor cannot get any advantage merely by accepting part of the debt for the whole, and the agreement is therefore *nudum pactum* (*m*). But any benefit or possibility of benefit, however small, will constitute a consideration. Thus, if

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(*g*) *Id.*, at p. 318. As was also pointed out, it might not have been the mere pecuniary value that the defendant most regarded. "He may have had other objects and motives, and of their weight he was the only judge."

(*h*) As to both these cases, see *post*, Chapter III., s. 1.

(*i*) That is to say, where "the thing stipulated for was, according to the state of the knowledge of the day, so absurd that the parties could not be supposed to have contracted": *Clifford* v. *Watts*, L. R. 5 C. P., at p. 588; 40 L. J. C. P. 36.

(*k*) *Harvey* v. *Gibbons*, 2 Lev. 161; *Haslam* v. *Sherwood*, 10 Bing. 540; 3 L. J. C. P. 176; *Whitmore* v. *Farley*, 45 L. T. 99.

(*l*) *Longridge* v. *Dorville*, 5 B. & Ald., at p. 123.

(*m*) *Foakes* v. *Beer*, 9 A. C. 605; 54 L. J. Q. B. 130; 51 L. T. 833, reviewing all earlier authorities.

there was any doubt whether a lease was at will or for years a promise to surrender it could be valuable consideration (*n*). And a promise to release the debt on payment of a lesser sum would be valid if the creditor got any further advantage, however small, as, *e.g.*, if payment were made before the day on which it was due (*o*).

And, as a general rule, there is no consideration if a man promises to do something which he is already under an obligation to do for the promisee (*p*), though there is consideration if he promises to do anything more than he is bound to do.

Thus in the case of *Stilk* v. *Myrick* (*q*) some seamen deserted from a ship, and the captain, not being able to find others to take their places, promised to divide the wages of the deserters among the rest of the crew. It was held that there was no consideration for this promise, because there was nothing more than an ordinary emergency of the contract. If, however, an extraordinary emergency arises, calling upon a seaman, or any other servant, to perform services altogether outside the scope of his original contract, he is discharged from his obligations and is free to make any new contract that he likes (*r*).

Upon the same principle, although the performance of an ordinary legal duty will not support a promise to pay, if a company or individual requisitions police protection of a special character for a particular purpose, a promise to pay would

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(*n*) 5 B. & Ald., at p. 123.

(*o*) 9 A. C., at pp. 615, 616, 629.

(*p*) See *Jackson* v. *Cobbin*, 8 M. & W., at p. 797; 10 L. J. Ex. 389; 58 R. R. 869. But it seems that "a promise made for valuable consideration and otherwise good as between the parties is not the less valid because the performance will operate in discharge of an independent liability of the promisor to a third person under an independent contract already existing," Pollock, Chapter IV. See also *Scotson* v. *Pegg*, 6 H. & N. 295; 30 L. J. Ex. 225; 123 R. R. 516; *Williams* v. *O'Keefe*, [1910] A. C., at p. 191; 79 L. J. P. C. 53; 101 L. T. 762; 26 T. L. R. 144.

(*q*) 2 Camp. 317; 11 R. R. 717. See also *Yates* v. *Hale*, 1 T. R. 73; *Harris* v. *Carter*, 3 E. & B. 559; 23 L. J. Q. B. 295; 97 R. R. 651.

(*r*) *Hartley* v. *Ponsonby*, 7 E. & B. 870; 26 L. J. Q. B. 232 (seamen discharged by the desertion of so many of the crew that it was not reasonable to require them to go to sea and a promise to pay them increased wages accordingly held to be good); *Liston* v. *Owners of S.S. Capathian*, [1915] 2 K. B. 42; 84 L. J. K. B. 1135; 110 L. T. 994; 31 T. L. R. 226 (seamen discharged by increase of risk through outbreak of war and free to make new contract for increased remuneration).

be implied and an express promise would not be without consideration (*s*).

The waiver or abandonment of any legal right is a valuable consideration. Thus the forbearance by the plaintiff, at the request of the defendant, to issue execution against (*t*) or to sue a third person (*u*) is sufficient consideration to support a promise by the defendant, to pay a sum of money to the plaintiff. But the mere giving of time to pay a debt which cannot be enforced, *e.g.*, a gambling debt, is not a valuable consideration for a promise to pay the debt (*x*). If, however, a right is questionable then its abandonment is sufficient consideration to support a promise (*y*). Accordingly, a compromise of a "serious claim, honestly made," is a valuable consideration, *whether or not the claim would have been successful* (*z*). "If an intending litigant *bona fide* forbears to litigate a question of law or fact, which it is not vexatious or frivolous to litigate, he does give up something of value" (*a*).

Failure of consideration.—Where the consideration has wholly failed, any money paid under the contract can be recovered (*b*). But, unless the consideration is severable, this is not the case when there is only a partial failure of consideration; thus if an apprentice or articled clerk pays a premium and the master dies before completion of the period of apprenticeship or articles, no portion of the premium can be recovered unless there is a stipulation providing for it (*c*). But in the event of the bankruptcy of the master provision is made by s. 34 of the Bankruptcy Act, 1914, for the return of a portion of the premium. And by s. 40 of the Partnership Act, 1890, where a partner

(*s*) *Glasbrook Bros., Ltd.* v. *Glamorgan County Council*, [1925] A. C., at pp. 281, 282; 94 L. J. K. B. 272; 132 L. T. 611; 41 T. L. R. 213.

(*t*) *Smith* v. *Algar*, 1 B. & Ad. 603; 9 L. J. K. B. 79.

(*u*) *Crears* v. *Hunter*, 19 Q. B. D. 341; 56 L. J. Q. B. 518.

(*x*) *Hyams* v. *Stuart King*, [1908] 2 K. B. 696; 77 L. J. K. B. 794.

(*y*) *Longridge* v. *Dorville* (*ubi supra*).

(*z*) *Miles* v. *New Zealand Alford Estate Co.*, 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 582.

(*a*) 32 Ch. D., at p. 277.

(*b*) *Ante*, p. 66.

(*c*) *Whincup* v. *Hughes*, L. R. 6 C. P. 78; 40 L. J. C. P. 104; 24 L. T. 76; *Ferns* v. *Carr*, 28 Ch. D. 400; 54 L. J. Ch. 478; 52 L. T. 348. See, however, *Ex p. Bayley*, 9 B. & C. 691; 8 L. J. K. B. 13; 33 R. R. 290; in which, in special circumstances, the survivor of two partners was ordered to repay a portion of the premium.

has paid a premium on entering into a partnership for a fixed term, and the partnership is determined before the end of the term, the Court may, subject to certain exceptions, order repayment of the premium or part thereof.

The mere fact that a person has received some benefit under a contract does not prevent him from recovering what he has paid if he has received no part of that which he contracted to receive. Thus, where A, having no title to a motor car, sold it to B who was compelled to surrender it to the true owner, it was held that B, although he had the use of the car for four months, was entitled to recover the purchase-money from A, as on a total failure of consideration, because the mere use of the car was no part of the consideration for which he had bargained, namely the property and right to possession (*d*).

SECTION 3.—*When Writing is required for Simple Contracts.*

In some cases simple contracts are required *either* to *be* in writing *or* to be *evidenced* by writing. Thus—

1. By the *Bills of Exchange Act*, 1882, bills of exchange (*e*) and promissory notes (*f*), and the acceptance (*g*) or endorsement (*h*) of a bill of exchange and the endorsement of a promissory note (*i*), must be in writing.

2. By *Lord Tenterden's Act* (*k*) no acknowledgment by a debtor can take any simple contract out of the operation of the Statute of Limitations (*l*) unless it is in writing signed by the debtor or, by the *Mercantile Law Amendment Act*, 1856, by the duly authorised agent of the debtor.

3. Special contracts of carriage with a railway or canal company under s. 7 of the *Railway and Canal Traffic Act*, 1854, do not bind the other party unless signed by him or by the person delivering the goods for carriage (*m*).

(*d*) *Rowland* v. *Divall*, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757.
(*e*) S. 3 (1). The term "bill of exchange" includes cheques (s. 73).
(*f*) S. 83 (1).
(*g*) S. 17 (2) (a).
(*h*) S. 32 (1).
(*i*) S. 89 (1).
(*k*) 9 Geo. 4, c. 14, s. 1.
(*l*) 21 Jac. 1, c. 16, s. 3.
(*m*) *Post*, Part II., Chapter III., s. 2.

4. By ss. 22 and 23 of the *Marine Insurance Act*, 1906, a contract of marine insurance is inadmissible in evidence unless embodied in a policy signed by or on behalf of the insurer.

5. Special agreements by a solicitor for his professional remuneration are not enforceable against his client unless they are in writing (*n*).

6. In the case of certain contracts within s. 4 of the Statute of Frauds and s. 40 of the *Law of Property Act*, 1925, *either* the agreement *or* some note or memorandum thereof must be in writing signed by the party to be charged or his authorised agent.

7. By s. 4 of the *Sale of Goods Act*, 1893 (which replaces s. 17 of the Statute of Frauds), a contract for the sale of goods of the value of £10 is, subject to certain exceptions, unenforceable by action unless there is a similar note or memorandum of the contract.

We shall here consider only the provisions of s. 4 of the Statute of Frauds (as amended by s. 40 of the Law of Property Act, 1925), and the rules governing the note or memorandum required by these sections and by s. 4 of the Sale of Goods Act.

Section 4 *of the Statute of Frauds* (as amended by s. 40 of the *Law of Property Act*, 1925).

These sections provide that *no action shall be brought*—

1. Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate (*o*); or
2. Whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person (*o*); or
3. To charge any person upon any agreement made in consideration of marriage (*o*); or
4. Upon any agreement that is not to be performed within the space of one year from the making thereof (*o*); or
5. *Upon any contract for the sale or other disposition of land, or any interest in land* (*p*);

(*n*) *Post*, Part I., Chapter V.
(*o*) S. 4 of the Statute of Frauds.
(*p*) S. 40 of the Law of Property Act, 1925, slightly modifying the language of a similar provision in s. 4 of the Statute of Frauds.

unless the agreement upon which such action shall be brought *or* some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

As to these five cases:—

1. *Special promise by executors or administrators to answer damages out of their own estate.*—As to this, it need only be noted (i) that the section applies only to a promise by an executor or administrator to answer damages *out of his own estate,* and (ii) that, as in the other cases within the statute, mere writing is not sufficient to make the executor or administrator liable upon his promise unless it is made for valuable consideration and all the other elements of a valid contract are present.

2. *Special promise to answer for the debt, default, or miscarriage of another person.*—These words apply to any contract which is a *guarantee* as distinct from a contract of indemnity (*q*). An agreement to give a guarantee is also within the statute (*r*). The words "default or miscarriage" include, however, liabilities arising out of a tort as well as those arising from contract. Thus, where A wrongfully, and without the leave of B, rode B's horse and killed it, it was held that a promise by C to pay B a sum of money in consideration of his not bringing any action against A was a promise to answer for the default or miscarriage of another (*s*).

3. *Agreement made in consideration of marriage.*—This does not mean the actual promise of marriage, the consideration for which is the *promise* by the other party, but refers to contracts for the doing of some collateral act in consideration of marriage (*t*). Accordingly, an action for breach of promise of marriage may be brought without written evidence, provided that the promise is corroborated in some material respect (*u*).

4. *Any agreement not to be performed within one year from the making thereof.*—This clause includes:—

(*q*) This distinction is explained in Part II., Chapter II.

(*r*) *Mallett* v. *Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40; 13 L. T. 410.

(*s*) *Kirkham* v. *Marter*, 2 B. & Ald. 613; 21 R. R. 416.

(*t*) *Vincent* v. *Vincent*, 56 L. T. 243: cp. *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J. Ch. 153; *Caton* v. *Caton*, L. R. 2 H. L. 127; 36 L. J. Ch. 886 (agreement for a marriage settlement).

(*u*) *Post*, Part IV.

i. An agreement which from its terms is actually incapable of performance within the year (*x*); and

ii. An agreement which distinctly shows on its face that the parties contemplated its duration for a definite period of more than a year, although it contains an express or implied term by which it *may* be terminated within the year (*y*).

But it does not include contracts for an indefinite period, which may or may not, according to circumstances, be performed within the year (*z*).

Accordingly, a contract to hire a carriage for five years, terminable at any time on payment of one year's hire (*a*), a contract to employ a man for two years subject to six months' notice (*b*), or to supply goods for three years subject to six months' notice (*c*), a contract to pay £80 a year for five years and then £60 for life (*d*), and a contract for a three years' partnership (*e*), are all within the section. But the section does not apply to a contract to pay a man money on his marriage (*f*), to leave money by will (*g*), to maintain a child for life (*h*), to pay a wife a weekly sum for maintenance (*i*), or to employ a man as sole agent for sale of patented goods until the patent should be sold to a company (*k*). A contract for a year's service to begin on the day after the making of the contract is not within the section. Thus, a contract made on December 6, 1902, for a year's service to begin on December 7, is not within the section, for the service ends on December 6, 1903, and the

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(*x*) *Peter* v. *Compton*, Skin. 353; *Giraud* v. *Richmond*, 2 C. B. 835; 15 L. J. C. P. 180.

(*y*) *Dobson* v. *Collis*, 1 H. & N. 81; 25 L. J. Ex. 267; 108 R. R. 466; *Ex p. Acraman*, 31 L. J. Ch. 741; *Hanau* v. *Ehrlich*, [1911] 2 K. B. 1056 (reviewing the earlier authorities); [1912] A. C. 39; 81 L. J. K. B. 162, 397.

(*z*) *Souch* v. *Strawbridge*, 2 C. B., at p. 815; 15 L. J. C. P. 170; 69 R. R. 615; *Hanau* v. *Ehrlich* (*ubi supra*).

(*a*) *Birch* v. *Earl of Liverpool*, 9 B. & C. 392; 33 R. R. 212.

(*b*) *Hanau* v. *Ehrlich* (*ubi supra*).

(*c*) *Ex p. Acraman* (*ubi supra*).

(*d*) *Sweet* v. *Lee*, 3 Man. & G. 452; 60 R. R. 546.

(*e*) *Tomkins* v. *Randell*, 19 W. R. 413.

(*f*) *Peter* v. *Compton*, Skin. 353.

(*g*) *Ridley* v. *Ridley*, 34 L. J. Ch. 462.

(*h*) *Murphy* v. *Sullivan*, 11 Ir. Jur. (N.S.) 111.

(*i*) *McGregor* v. *McGregor*, 21 Q. B. D. 424; 57 L. J. Q. B. 491.

(*k*) *Lavelette* v. *Richards*, 24 T. L. R. 336.

law does not regard the fraction of the day upon which the contract was made (*l*). But the contract would be within the section if the service was to begin on December 8 or any later date (*m*).

It must further be noted that an agreement is not within the section if it is to be entirely executed on one side within a year and it was the intention of the parties, founded on a reasonable expectation, that it should be so. Thus, where the tenant under a twenty years' lease, of which fourteen years had still to run, verbally promised his landlord that, in consideration of £50 to be laid out in alterations by the landlord, he would pay an additional rent of £5 a year during the remainder of the lease, it was held that, as the laying out of the £50 was to be within a year, the agreement was not within the section, and need not be in writing (*n*). But if one party cannot perform his part of the contract within a year, and no intention is manifested that the other party should fully perform his part within a year, the section applies, *e.g.*, if a dairyman hires a servant at a weekly wage and subject to a week's notice, but the servant is not for thirty-six months after leaving the service to carry on a dairy business within four miles (*o*). Where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed till after a year does not bring the case within the section, although such request be acceded to (*p*).

5. *Any contract for the sale or other disposition of land or any interest in land.*—This section of the Law of Property Act, 1925, apparently reproduces the previous law, as settled by a

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(*l*) *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 538; 72 L. J. K. B. 235; 88 L. T. 442.

(*m*) *Bracegirdle* v. *Heald*, 1 B. & Ad. 722; *Britain* v. *Rossiter*, 11 Q. B. D. 123; 48 L. J. Ex. 362.

(*n*) *Donnellan* v. *Read*, 3 B. & Ad. 899; 1 L. J. K. B. 269; 37 R. R. 588. It was also held that the contract was not one which related to any interest in land, because it gave no additional interest in the land either to the tenant or to the landlord, the so-called additional "rent" of £5 not being rent in the legal sense. See also *Cherry* v. *Hemming*, 4 Ex. 631; 19 L. J. Ex. 63; 80 R. R. 733, where a contract by A to assign a patent forthwith, and by B to pay for it by instalments over several years, was held not within the section.

(*o*) *Reeve* v. *Jennings*, [1910] 2 K. B. 522; 79 L. J. K. B. 1137.

(*p*) *Bevan* v. *Carr*, 1 C. & E. 499.

series of decisions upon s. 4 of the Statute of Frauds (*q*), which applied only to contracts "operating upon an interest in land" (*r*), not to collateral or antecedent contracts. Thus, where A agreed to let a house to B and to make certain improvements and alterations in the house, and B agreed to take the house and to pay for the improvements and alterations, it was held that this contract was within the Statute of Frauds (*s*): "the principal subject-matter of the agreement was the occupation of the premises . . . the consideration was entire, for the letting of the house with the alterations" (*t*). But where A, in order to induce B to become his tenant, made an agreement that, *if* B became his tenant, he would subsequently do certain repairs, it was held that this agreement to do repairs, being antecedent and collateral to the contract of tenancy, was not within the Statute of Frauds: it was a separate agreement made to induce B to enter into a contract of tenancy, but not binding him to become tenant, and so not involving any agreement relating to an interest in land (*u*). On the same principle an agreement between A and B that, if B bought a house, A would repay him the amount of the purchase-money, was held not to be within the Statute of Frauds (*x*); it "created no obligation to acquire an interest in land, it did not affect the owner of the land mentioned, nor did it create or deal with the interest of anyone in it" (*y*).

A contract which gives a mere licence to go upon or use land does not pass any interest in the land to the licensee, but merely prevents him from being a trespasser. Accordingly, a contract for the use of a dock, but not giving any exclusive right to its possesssion, was not within the Statute of Frauds (*z*). But a

(*q*) The corresponding words in the Statute of Frauds were: "Any contract or sale of lands, tenements or hereditaments or any interest in or concerning them."

(*r*) *Boston* v. *Boston*, [1904] 1 K. B., at p. 127; 73 L. J. K. B. 17; 89 L. T. 468; 20 T. L. R. 23.

(*s*) *Vaughan* v. *Hancock*, 3 C. B. 766; 16 L. J. C. P. 1; 71 R. R. 483. See also *Mechelin* v. *Wallace*, 7 Ad. & E. 49; 6 L. J. K. B. 217; 45 R. R. 669.

(*t*) *Id.*, *at* p. 769.

(*u*) *Angell* v. *Duke*, L. R. 10 Q. B. 174; 44 L. J. Q. B. 78; 32 L. T. 25. See also *Hoby* v. *Roebuck*, 7 Taunt. 157; 17 R. R. 477; *Mann* v. *Nunn*, 43 L. J. C. P. 241; *Donellan* v. *Read*, 3 B. & Ad. 899; 1 L. J. K. B. 269; 37 R. R. 588 (see *ante*, p. 71).

(*x*) *Boston* v. *Boston*, (*ubi supra*). (*y*) *Id.*, [1904] 1 K. B., at p. 127.

(*z*) *Wells* v. *Kingston-upon-Hull Corporation*, L. R. 10 C. P. 402; 44 L. J. C. P. 257; 32 L. T. 615.

contract which is not merely for a licence but also for a right in the nature of a *profit à prendre, i.e.*, a right to take something out of the land, creates an interest in land (*a*); thus a contract for the right to shoot over land and to take away part of the game killed was within the Statute of Frauds (*b*).

Upon the same principle a contract for the letting of apartments was within the Statute of Frauds (*c*), but not a contract for board and lodging (*d*).

An agreement creating a charge upon land was within the Statute of Frauds (*e*). Accordingly a contract for the sale of a company's debentures creating a charge over land owned by the company was a contract for the sale of an interest in land within the Statute of Frauds (*f*). But a contract for the sale of shares in a railway company was not within the Statute of Frauds (*g*).

Contracts for the sale of produce of the soil or of things attached to land were not within s. 4 of the Statute of Frauds if made after the subject-matter of the contract had been severed from the soil and had so acquired an independent existence as a chattel, but were contracts for the sale of goods, and were formerly governed by s. 17 of the Statute of Frauds, which was replaced by s. 4 of the Sale of Goods Act, 1893. And even if the sale was before severance, a contract for the sale of emblements or *fructus industriales* was within s. 17 and not within s. 4 (*h*). But with regard to *fructus naturales*, the rules laid down before 1893 were

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(*a*) See *Frank Warr & Co., Ltd.* v. *London County Council*, [1904] 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368; 20 T. L. R. 396.

(*b*) *Webber* v. *Lee*, 9 Q. B. D. 315; 51 L. J. Q. B. 485.

(*c*) *Edge* v. *Strafford*, 1 C. & J. 391; 9 L. J. Ex. 101; 35 R. R. 746; *Inman* v. *Stamp*, 1 Stark. 12; 18 R. R. 740. That is to say, provided that the occupier is not to be a mere lodger, but is to have such an exclusive possession of the apartments as would entitle him to maintain trespass or ejectment for a disturbance of his possession. See *Allan* v. *Overseers of Liverpool*, L. R. 9 Q. B., at pp. 191, 192; 43 L. J. M. C. 69; *R.* v. *St. George's Union*, L. R. 7 Q. B. 90; 41 L. J. M. C. 30; and Encycl. of the Laws of England, tit. "Lodger." It must be noted that the statements in the text have reference only to executory agreements for a tenancy, not to cases in which a tenancy is created either by lease or by entry under an agreement for a lease. See *post*, Part II., Chapter VI.

(*d*) *Wright* v. *Stavert*, 2 E. & E. 721; 29 L. J. Q. B. 161; 119 R. R. 130.

(*e*) *Whitmore* v. *Farley*, 28 W. R. 908; 43 L. T. 192.

(*f*) *Driver* v. *Broad*, [1893] 1 Q. B. 744; 63 L. J. Q. B. 12; 69 L. T. 169.

(*g*) *Duncuft* v. *Albrecht*, 12 Sim. 189; 56 R. R. 46.

(*h*) *Evans* v. *Roberts*, 5 B. & C. 829; 4 L. J. K. B. 313; 29 R. R. 421 (potatoes); *Jones* v. *Flint*, 10 A. & E. 753; 9 L. J. Q. B. 252; 50 R. R. 527 (corn and potatoes).

that (i) if the *seller* was to sever them the contract was within s. 17 (*i*); but (ii) if the *buyer* was to sever them the contract was within s. 4 (*k*), *unless* (iii) the buyer was to sever them *at once*, so that they would not derive any benefit from remaining in the soil (*l*). A contract for the sale of *fixtures* did not come within either s. 4 or s. 17 (*m*); but, before 1893, a contract for the sale of other things affixed to the soil was within s. 4 (*n*).

Now, by s. 62 of the *Sale of Goods Act*, 1893, the term "goods" includes "emblements, industrial growing crops (*o*), and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." Accordingly, whenever the contract of sale contemplates severance, either by the seller or by the buyer, it is a contract for the sale of goods and is governed by the provisions of the *Sale of Goods Act*, 1893.

Form and Contents of the Memorandum or Note in Writing required by s. 4 of the Statute of Frauds, s. 40 of the Law of Property Act, 1925, and s. 4 of the Sale of Goods Act, 1893.

It must be noted that these statutes do not make it necessary that the contract should be in writing; their requirements are satisfied if there is "a signed admission (*i.e.*, by the defendant) that there was a contract and a signed admission of what that contract was" (*p*), and for that purpose "any writing embodying the terms of the contract and signed by the party to be charged is sufficient" (*q*). Thus it is sufficient if there is a written offer

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(*i*) *Smith* v. *Surman*, 9 B. & C. 561; 7 L. J. K. B. 296; 33 R. R. 259 (growing timber).

(*k*) *Crosby* v. *Wadsworth*, 6 East, 602; 8 R. R. 566 (mowing grass).

(*l*) *Marshall* v. *Green*, 1 C. P. D. 35; 45 L. J. C. P. 153; 33 L. T. 104 (growing timber).

(*m*) *Lee* v. *Gaskell*, 1 Q. B. D. 700; 45 L. J. Q. B. 540; 34 L. T. 759.

(*n*) *Lavery* v. *Pursell*, 39 Ch. D. 508; 57 L. J. Ch. 570; 58 L. T. 846 (contract for the sale of the materials of a house which were to be cleared away in two months).

(*o*) This term includes crops which, though owing their existence to skill and labour, are not included in "emblements," which expression is confined to crops that ordinarily repay the labour of producing them within the year in which the labour is bestowed (*Graves* v. *Weld*, 5 B. & Ad. 105; 2 L. J. K. B. 176; 39 R. R. 419).

(*p*) *Thirkell* v. *Gambi*, [1919] 2 K. B., at p. 597; 89 L. J. K. B. 1; 121 L. T. 532; 35 T. L. R. 652.

(*q*) *Re Hoyle*, [1893] 1 Ch., at p. 98; 62 L. J. Ch. 182; 67 L. T. 674.

containing the terms of the contract, even though the acceptance is verbal (*r*).

Nor is it necessary that any idea of agreement should have been present to the mind of the party signing the memorandum (*s*). Accordingly, it has been held that the statutory requirements were met by an admission contained in a letter written by the defendant to his own agent (*t*), or in an affidavit made by him for some other purpose (*u*), or in his will. Thus, in *Re Hoyle; Hoyle* v. *Hoyle* (*x*), a testator had in his lifetime made a verbal promise to guarantee the payment of debts due from his son to a certain firm, and in his will and codicil he recited this fact. In the administration of his estate the firm made a claim under the guarantee, and it was held that the recital of the guarantee in the will and codicil was a memorandum or note in writing which satisfied s. 4 of the Statute of Frauds.

A letter written by the defendant to the plaintiff, recognising the existence of a contract and its terms, is not prevented from being a sufficient memorandum merely because the defendant denies his liability under the contract. Thus, in the case of *Bailey* v. *Sweeting* (*y*), A bought from B some chimney-glasses for £38 10s. 6d. The glasses being damaged in transit, A refused to receive them and wrote to B as follows: "The parcel of goods selected . . . was the chimney glasses, amounting to £38 10s. 6d., which . . . I have long since declined to have, for reasons made known to you at the time." It was held that, as this letter recited all the essential terms of the bargain, it was none the less a note or memorandum thereof, because it was accompanied by a statement that the defendant did not consider himself liable in law for the performance of it. But the principle does not apply where the defendant admits a contract but sets up different terms from those alleged by the plaintiff (*z*). So also a letter

(*r*) *Reuss* v. *Picksley*, L. R. 1 Ex. 342; 35 L. J. Ex. 218.
(*s*) *Re Hoyle (ubi supra)*.
(*t*) *Gibson* v. *Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5; 13 L. T. 293.
(*u*) *Barkworth* v. *Young*, 4 Drew. 1; 26 L. J. Ch. 153; 113 R. R. 297.
(*x*) [1893] 1 Ch. 84.
(*y*) 9 C. B. (N.S.) 843; 30 L. J. C. P. 150; 127 R. R. 896 (a decision upon s. 17 of the Statute of Frauds). See also *Wilkinson* v. *Evans*, L. R. 1 C. P. 407; 35 L. J. C. P. 224; *Buxton* v. *Rust*, L. R. 7 Ex. 279; 41 L. J. Ex. 1; 26 L. T. 702; *Dewar* v. *Mintoft*, [1912] 2 K. B., at p. 387; 81 L. J. K. B. 885.
(*z*) *Smith* v. *Surman*, 9 B. & C. 561; 7 L. J. Q. B. 296; 33 R. R. 259.

signed by the defendant and referring to other letters or documents as containing the terms of a contract, may be a sufficient note or memorandum, although it repudiates liability (*a*); but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum (*b*).

From the preceding paragraph it will be observed that *the memorandum or note may be made out from more than one document.* As to this, the rule formerly was that, when a writing signed by the defendant or his agent referred to some other document, that document might be incorporated into the signed writing so as to make up a complete memorandum or note, provided that it could, *without oral evidence*, be identified by means of the reference contained in the signed writing (*c*). The present rule, however, is that if the writing signed by the defendant refers to some other transaction which may have been in writing, oral evidence is admissible to prove that such transaction was in writing and to identify a particular document as being the transaction to which the reference is made (*d*). Thus, where a writing signed by the defendant or his agent refers to previous "instructions" (*e*), or to a previous "offer" (*f*), or "arrangement" (*g*), oral evidence is admissible to show that such "instructions," or "offer," or "arrangement" were in writing and were contained in a document which is produced and which, being so identified, becomes incorporated with the signed writing, and thus makes up a complete note or memorandum.

The extent to which this principle goes may be illustrated by two cases. In the case of *Long* v. *Millar* (*h*), the plaintiff signed an agreement "to purchase three plots of land in Richford Street, Hammersmith, for the sum of £310 and . . . to pay as

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(*a*) *Dewar* v. *Mintoft*, [1912] 2 K. B. 373; 81 L. J. K. B. 885; 106 L. T. 673; 28 T. L. R. 324.

(*b*) *Thirkell* v. *Cambi*, [1919] 2 K. B. 590; 89 L. J. K. B. 1; 121 L. T. 532; 35 T. L. R. 652.

(*c*) *Boydell* v. *Drummond*, 11 East, 158; 10 R. R. 450.

(*d*) *Ridgway* v. *Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46; *Baumann* v. *James*, 3 Ch. D. 508; 18 L. T. 424.

(*e*) *Ridgway* v. *Wharton* (*ubi supra*).

(*f*) *Long* v. *Millar*, 4 C. P. D., at p. 454; 48 L. J. C. P. 596.

(*g*) *Cave* v. *Hastings*, 7 Q. B. D. 125; 50 L. J. Q. B. 575; 45 L. T. 438.

(*h*) 4 C. P. D. 450; 48 L. J. C. P. 596.

a deposit the sum of £31 "; the defendant did not sign this agreement, but signed the following receipt: "Received of Mr. G. Long the sum of £31 as a deposit on the purchase of three plots of land at Hammersmith." It was held that the word "purchase" meant agreement to purchase, and that oral evidence was admissible to prove that this agreement was in writing and to identify it with the agreement signed by L.

In the case of *Oliver* v. *Hunting* (*i*), the defendant agreed to sell to the plaintiff for £2,375 a freehold estate known as the F. M. H. estate and signed a memorandum which contained all the essential terms of the contract except that it omitted to mention or refer to the property agreed to be sold. Two days afterwards the plaintiff sent to the defendant a cheque for £375 as deposit and part payment of the price, and the defendant, in reply, wrote "I beg to acknowledge receipt of cheque, value £375, on account of the purchase money for the F. M. H. estate." It was held that, since this letter contained a reference to the F. M. H. estate as the subject of a sale, oral evidence was admissible to prove the circumstances under which it was written and to show that the reference was to the previous memorandum of agreement, so enabling the two documents to be read together as a complete memorandum.

It must be noted that oral evidence is admissible only to *identify* the document *to which reference is made* in the writing signed by the defendant or his agent. If no reference to another document appears on the face of the signed writing, oral evidence is not admissible to show that it was intended to refer to another instrument (*k*).

But documents which form the actual component parts of a memorandum made at one time may be identified and connected, though there is no reference in one to the other. Thus, where the defendant wrote to the plaintiff a letter containing all the terms of the contract, but beginning "Dear Sir," and not containing the name of the plaintiff, it was held that the plaintiff might prove that he received the letter in an envelope bearing his name and that the letter and envelope could be taken together to

(*i*) 44 Ch. D. 205; 59 L. J. Ch. 255; 62 L. T. 108.

(*k*) *Potter* v. *Peters*, 64 L. J. Ch. 357; 74 L. T. 624; cp. *Long* v. *Millar*, 4 C. P. D., at p. 456; 48 L. J. C. P. 596.

constitute a memorandum in writing within s. 4 of the Statute of Frauds or s. 4 of the Sale of Goods Act, 1893 (*l*).

Where the statutes and s. 40 of the Law of Property Act, 1925, do not apply there is nothing to prevent the connection of several documents by oral evidence (*m*).

The memorandum must contain:

1. *The names of the parties or descriptions by which they are sufficiently identified or capable of identification* (*n*); " the statute will be satisfied if the parties are sufficiently described so that their identity cannot be fairly disputed " (*o*). Thus, " if the vendor is described as ' proprietor,' ' owner,' ' mortgagee,' or the like, the description is sufficient, though he is not named; but if he is described as ' vendor,' or as ' client,' or ' friend ' of a named agent, that is not sufficient, the reason . . . being . . . that the former description is a statement of fact, as to which there can be perfect certainty . . . the reason against the latter description being that in order to find out who is vendor, client or friend, you must go into evidence on which there might possibly . . . be a conflict, and that . . . is exactly what the Act [*i.e.*, the Statute of Frauds] says shall not be decided by parol evidence " (*p*). But the names of the parties must appear *as such parties*, *i.e.*, the seller must be named or described as seller (*q*), and the purchaser as purchaser (*r*).

If the memorandum is made by an agent for an undisclosed

(*l*) *Pearce* v. *Gardner*, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457; 76 L. T. 441. In the later case of *Jones Brothers, Ltd.* v. *Joyner*, 82 L. T. 878, the plaintiff's name was on a leather case and the rest of the memorandum was in a paper book which was merely slipped into the case, so that it could be removed when full and replaced by another. It was held that the two could be taken together to constitute a memorandum.

(*m*) *Edwards* v. *Aberayron Mutual Insurance Society*, 1 Q. B. D., at p. 587; 44 L. J. Q. B. 67. See also *McGuffie* v. *Burleigh*, 78 L. T. 264, where oral evidence was admitted to show that a letter was written in answer to a former one in order to read the two letters together, so that they might constitute a written acknowledgment to take a debt out of the Statute of Limitations.

(*n*) *Stokes* v. *Whicher*, [1920] 1 Ch. 411; 89 L. J. Ch. 198; 123 L. T. 23.

(*o*) *Lovesy* v. *Palmer*, [1916] 2 Ch., at p. 240; 85 L. J. Ch. 481; 114 L. T. 1033.

(*p*) *Jarrett* v. *Hunter*, 34 Ch. D., at p. 184; 56 L. J. Ch. 141, and cases there cited. See also *Carr* v. *Lynch*, [1900] 1 Ch. 613; 69 L. J. Ch. 345; 82 L. T. 381.

(*q*) *Vandenbergh* v. *Spooner*, L. R. 1 Ex. 316; 35 L. J. Ex. 201; 14 L. T. 701.

(*r*) *Dewar* v. *Mintoft*, [1912] 2 K. B., at p. 385; 81 L. J. K. B. 885; cp. *Cohen* v. *Roche*, [1927] 1 K. B. 180.

principal, oral evidence is admissible to prove who is the principal (*s*), provided that by the memorandum the agent is himself liable on the contract (*t*). Where, however, a memorandum is signed by X as "agent for A (hereinafter called the vendor)" oral evidence is not admissible to vary the memorandum by proving that in fact there were two vendors, namely, A and B (*u*).

2. *The name or a sufficient description of the property.*—Here also, as in the case of the parties, *Id certum est quod certum reddi potest.* If, therefore, there is in the memorandum a description of the property which is sufficiently definite for its identification it may be identified by oral evidence (*x*). Thus, the following have been held to be sufficient descriptions: (i.) "Mr. Ogilvie's house" (*y*); (ii.) "Property purchased at £420 at the Sun Inn Preston on the above date" (*i.e.*, the date of the memorandum) (*z*); (iii.) "Twenty-four acres of land at Totmanslow, in the parish of Draycott" (*a*); (iv.) A receipt for a deposit on a house described as sold by N to A for £500 on November 21, 1918 (*b*).

3. *All the material* (*c*) *terms of the contract*, including the

(*s*) *Filby* v. *Hounsell*, [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270.

(*t*) *Lovesy* v. *Palmer* (*ubi supra*). If an agent contracts only on behalf of an undisclosed or unnamed principal and not on his own account, he can neither sue nor be sued upon the agreement. An unnamed principal cannot sue or be sued upon a contract for which a written memorandum is required where he is not sufficiently described in the memorandum, except where by the memorandum the agent is himself liable on the contract, for otherwise there is no memorandum of any *agreement at all* ([1916] 2 Ch., at pp. 242, 243, 244).

(*u*) *Keen* v. *Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513. And this is not affected by the fact that A and B are partners, because s. 5 of the Partnership Act, 1890 (*post*, Part II., Chapter I.) did not override s. 4 of the Statute of Frauds (*Keen* v. *Mear*, *ubi supra*).

(*x*) *Shardlow* v. *Cotterell*, 20 Ch. D. 90; 51 L. J. Ch. 353; 45 L. T. 572; *Auerbach* v. *Nelson*, [1919] 2 Ch. 383; 88 L. J. Ch. 493; 35 T. L. R. 655.

(*y*) *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13; approved in *Bank of New Zealand* v. *Simpson*, 82 L. T., at p. 104.

(*z*) *Shardlow* v. *Cotterell* (*ubi supra*). In this case it was said by Jessel, M.R., that any two specific terms are enough to point out sufficiently what is sold, *e.g.*, "the estate of B in the county of C," or "the estate of A B which he bought of C D."

(*a*) *Plant* v. *Bourne*, [1897] 2 Ch. 281; 66 L. J. Ch. 643; 76 L. T. 820.

(*b*) *Auerbach* v. *Nelson* (*ubi supra*).

(*c*) *Blackburn* v. *Walker*, [1920] W. N. 291; "substantial parts" (*Wilkinson* v. *Evans*, 9 C. B. (N.S.), at p. 857); "essential terms" (*ibid.*, at p. 860). Thus an agreement for a lease must state expressly or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence (*Humphery* v. *Conybeare*,

consideration (*d*). But in the case of guarantees it was provided by the *Mercantile Law Amendment Act*, 1856 (*e*), that the promise of the defendant "shall not be deemed invalid to support an action . . . by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document" (*f*). But though oral evidence is admissible to prove the consideration, the promise must still appear in writing (*g*).

The memorandum must be *signed by the party to be charged or some other person thereunto by him lawfully authorised*.—For the purposes of the statutes there is a sufficient signature if the name of the party to be charged is inserted in the agreement, or appropriated to the agreement, as the name of the party with whom the agreement is to be made, either by himself or by his authorised agent (*h*). And it is immaterial what form the signature takes (*i.e.*, whether it is written or printed) (*i*), and whether it is in the body of the memorandum or at the beginning or end (*k*), provided that it is intended to authenticate and ratify the *whole* agreement (*l*).

Thus it has been held that there was a sufficient signature in the following cases:—

i. Where the defendant wrote a letter beginning "I, James Crockford, agree to sell" (*m*).

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80 L. T. 40; 15 T. L. R. 162). And on an agreement for the sale of goods the mode of delivery against payment must be stated (*Thirkell* v. *Cambi*, [1919] 2 K. B., at p. 598; 89 L. J. K. B. 1).

(*d*) *Wain* v. *Warlters*, 5 East, 10; 7 R. R. 645; *Potter* v. *Peters*, 64 L. J. Ch., at p. 360. A contract for the sale of goods may be complete although no price is fixed, as in such a case the law implies a promise to pay a reasonable price (Sale of Goods Act, 1893, s. 8, sub-s. 2, *post*, Chapter IV.).

(*e*) 19 & 20 Vict. c. 97, s. 3.

(*f*) On a contract for the sale of goods, if the price is not fixed by the agreement, the memorandum may be complete without any mention of the price (*Hoadley* v. *McLaine*, 10 Bing. 482; 3 L. J. C. P. 162; 38 R. R. 510). But if the price is fixed it must be mentioned (*Elmore* v. *Kingscote*, 5 B. & C. 583; 29 R. R. 341).

(*g*) *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361; 28 L. J. C. P. 301.

(*h*) *Evans* v. *Hoare*, [1892] 1 Q. B. 593; 61 L. J. Q. B. 470; *Hucklesby* v. *Hook*, 82 L. T., at p. 117; *Horner* v. *Walker*, [1923] 2 Ch. 218; 92 L. J. Ch. 573; 129 L. T. 782.

(*i*) *Saunderson* v. *Jackson*, 2 B. & P. 138; 5 R. R. 580; *Schneider* v. *Norris*, 2 M. & S. 286; 15 R. R. 250. (*k*) [1892] 1 Q. B., at p. 597.

(*l*) *Caton* v. *Caton*, L. R. 2 H. L., at pp. 139, 143; 36 L. J. Ch. 886; 148 R. R. 273; *Cohen* v. *Roche*, [1927] 1 K. B. 180.

(*m*) *Knight* v. *Crockford*, 1 Esp. 190; 5 R. R. 729.

ii. Where a clerk of the defendants (H. M. & Co.), with their authority, drew up the following document and handed it to the plaintiff for his signature:—

"Messrs. Hoare Mann & Co. 26, 29, Bridge Row, London, E.C. Gentlemen,—In consideration of your advancing my salary, etc., I hereby agree to continue my engagement in your office for three years, etc.

"Yours obediently,

'George Evans" (*n*).

iii. Where the defendant (John Dodgson), on purchasing hops from the plaintiff, wrote a memorandum, afterwards signed by the plaintiff's agent, beginning "Sold John Dodgson, 27 pockets Playsted, 1836, Sussex, at 103s., etc." (*o*).

iv. Where the defendant (Norris), on selling yarn to the plaintiff, handed to him an invoice, at the top of which his own name (Norris) was printed and in which he himself had written the name of the plaintiff, thus inserting the plaintiff's name as buyer in a paper in which he recognised himself as seller and appropriating the printed name to the agreement as a signature (*p*). On the same principle it has recently been held that there was a sufficient signature by the defendant, an auctioneer, where his name was printed upon the front page of his sale catalogue, the leaves of which were pasted into a book in such a way as to leave a space in which, at the sale, he made, against each lot, an entry of the price and the purchaser (*q*).

A person "who signs as an agent must be authorised to sign a memorandum of a contract of the nature of that on which the plaintiff relies, and . . . it is for the plaintiff to prove that the

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(*n*) *Evans* v. *Hoare* (*ubi supra*).

(*o*) *Johnson* v. *Dodgson*, 2 M. & W. 653; 6 L. J. Ex. 185.

(*p*) *Schneider* v. *Norris*, 2 M. & S. 286; 15 R. R. 250. With this must be carefully compared the case of *Hucklesby* v. *Hook*, 82 L. T. 177, where, though a letter was written by the plaintiff to the defendant upon paper printed with the name and address of the defendant, the evidence showed that the printed name of the defendant had not been appropriated to the contract.

(*q*) *Cohen* v. *Roche*, [1927] 1 K. B. 180.

signatory was an agent so authorised" (*r*). One party cannot sign as the agent for the other (*s*), but one agent may sign for both parties, as in the case of a broker (*t*), or auctioneer (*u*).

No action shall be brought.—If there is no memorandum the contract is *unenforceable* (*x*). The statutes do not affect the validity of the contract (*y*), but only make a particular kind of evidence necessary (*z*); that evidence must be in existence at the commencement of the action; if it comes into existence subsequently and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another (*a*).

But the operation of the statutes is excluded in four cases:

i. Where they are not expressly pleaded by the defendant (*b*).

ii. Where property is sold under an order of the Court (*c*).

iii. Where the want of written evidence is due to the fraud of the defendant (*d*).

iv. Where, *in an action for specific performance*, there has been part performance of the contract, so that it would

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(*r*) *Thirkell* v. *Cambi*, [1919] 2 K. B., at p. 598; 121 L. T. 532; 89 L. J. K. B. 1; explaining and distinguishing *John Griffiths Cycle Corporation* v. *Humber & Co.*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; and *Daniels* v. *Trefusis*, [1914] 1 Ch. 788; 83 L. J. Ch. 579. See also *Ridgway* v. *Wharton*, 6 H. L. C., at p. 296; *Smith* v. *Webster*, 3 Ch. D. 49; 45 L. J. Ch. 528; 35 L. T. 44; *North* v. *Loomes*, [1919] 1 Ch. 378; 88 L. J. Ch. 217; 120 L. T. 533; *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314; 92 L. J. Ch. 598; 129 L. T. 659; 39 T. L. R. 576. A pleading signed by counsel is a memorandum by an authorised agent (*Grindel* v. *Bass*, [1920] 2 Ch. 487; 89 L. J. Ch. 591).

(*s*) *Farebrother* v. *Simmons*, 3 B. & Ald. 333; 24 R. R. 399; *Sharman* v. *Brandt*, 6 Q. B. 720; 43 L. J. Q. B. 312.

(*t*) *Thompson* v. *Gardiner*, 1 C. P. D. 777.

(*u*) Upon a sale *by auction* the auctioneer, though employed by the seller, has authority to sign on behalf of the purchaser, provided that he signs at the time of the sale (*Bell* v. *Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254). But such a signature on behalf of the purchaser will not be sufficient in an action brought by the *auctioneer* himself against the purchaser (*Farebrother* v. *Simmons*, *ubi supra*).

(*x*) See *Morris* v. *Baron & Co.*, [1918] A. C., at p. 11; 87 L. J. K. B. 145; 118 L. T. 34.

(*y*) *Leroux* v. *Brown*, 12 C. B. 801; 22 L. J. C. P. 1; 92 R. R. 889; *Re Holland*, [1902] 2 Ch., at p. 375; 71 L. J. Ch. 518; 86 L. T. 542; 18 T. L. R. 563. Accordingly, money paid under it cannot be recovered (*Sweet* v. *Lee*, 3 M. & G. 542; 60 R. R. 546).

(*z*) *Re Hoyle*, [1893] 1 Ch., at p. 97; 62 L. J. Ch. 182.

(*a*) *Lucas* v. *Dixon*, 22 Q. B. D. 337; 58 L. J. Q. B. 161.

(*b*) Order XIX., r. 15.

(*c*) *Att.-Gen.* v. *Day*, 1 Ves. Sen. 218.

(*d*) *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; 66 L. J. Ch. 74; 75 L. T. 502.

be a fraud on the part of the defendant to set up the statute (*e*).

Moreover a party to an agreement which is unenforceable for want of a written memorandum may in some cases have an *alternative* right of action. Thus, although he cannot enforce the express agreement merely because he has performed his part, he may nevertheless if under the agreement he has rendered any services to the other party, sue upon an implied contract to pay him according to his deserts (*f*). Thus it has been held that a farm-labourer who, by an oral agreement, was employed under a contract of service not to be performed within a year, could sue on an implied contract to pay a reasonable sum for the services actually rendered by him (*g*). So also an action upon an account (*h*) stated will lie for a debt due under an agreement which is unenforceable for want of a written memorandum (*i*).

(*e*) See Wilshere's Equity, Chapter XIII.

(*f*) *Scott* v. *Pattison*, [1923] 2 K. B., at p. 727; 92 L. J. K. B. 886; 129 L. T. 830; 39 T. L. R. 557.

(*g*) *Id.* See also *Knowlman* v. *Bluett*, L. R. 9 Ex. 307; 43 L. J. Ex. 151; 32 L. T. 262; *Pulbrook* v. *Lawes*, 1 Q. B. D. 284; 45 L. J. Q. B. 178; 34 L. T. 95.

(*h*) *Ante*, p. 48.

(*i*) *Cocking* v. *Ward*, 1 C. B. 858; 15 L. J. C. P. 245; see also *Laycock* v. *Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 43; 9 L. T. 378.

CHAPTER III.

REALITY OF CONSENT.

Where written evidence is necessary, a contract, in the absence of such evidence, is merely unenforceable by action, and may in other respects have some legal effects. Thus, a contract for the sale of goods, though unenforceable by action for want of compliance with s. 4 of the Sale of Goods Act, 1893, may nevertheless have the effect of passing the property in the goods sold (*a*).

Void and Voidable Contracts.—There are, however, some cases in which a contract may have no legal effect because it is either void or voidable. A *void* contract is one which never has any legal effect; a *voidable* contract is one which *may* be set aside but is valid until it has actually been set aside. The difference between a void and a voidable contract is of particular importance so far as concerns the rights of third parties. Thus, mistake of certain kinds renders a contract *void*, but misrepresentation merely makes it *voidable* at the option of the party deceived (*b*). If, therefore, A, under such a mistake as renders the contract void, sells goods to B, who in turn sells them to C, A can recover the goods from C, because B never had any title to the goods and could therefore give no title to C (*c*). But if the sale was induced by a misrepresentation on the part of B, the contract is valid until it is rescinded, and B, therefore, until rescission, had a good title which he could pass to C, from whom, accordingly, the goods cannot be recovered if, before rescission, he bought from B in good faith and without notice of the misrepresentation (*d*).

(*a*) See *Taylor* v. *Great Eastern Railway*, [1905] 1 K. B. 774; 70 L. J. K. B. 499. See also *Sweet* v. *Lee*, *ante*, p. 82.

(*b*) *Oakes* v. *Turquand*, L. R. 2 H. L., at p. 346; 36 L. J. Ch. 949; 16 L. T. 808.

(*c*) *Cundy* v. *Lindsay*, 3 A. C. 459; 47 L. J. Q. B. 481.

(*d*) *Id.*, and see *Phillips* v. *Brooks*, *Ltd.*, [1919] 2 K. B. 243; 88 L. J. K. B. 953; 121 L. T. 249; 35 T. L. R. 470.

Section 1. *Misrepresentation and Fraud.*

A misrepresentation must be distinguished from the breach of a condition or warranty. Conditions and warranties are terms of a contract, so that their non-performance is a breach of the contract (*e*). A representation, on the other hand, is a statement which induces, but does not form part of, the contract. Thus, if A contracts to sell goods of a particular make or quality, his stipulations as to their make or quality are conditions or warranties; that is to say, the contract must be performed by the supply of goods of the make or quality promised. But if A induces the purchaser to contract by making a false statement as to his reasons for selling, that statement is not a promise which has to be fulfilled in the performance of the contract but is a misrepresentation which induces the contract.

What amounts to a Misrepresentation.—To constitute a misrepresentation rendering a contract voidable:

1. *There must be a positive misstatement or a statement so partial and fragmentary that the omissions make what is stated absolutely false* (*f*).

The misstatement may be either by words or by conduct, as, for example, by some contrivance to hide defects in a thing sold (*g*). And if a matter is stated partially there may be as false a statement as if it were misstated altogether. "Every word may be true, but if you leave out something which qualifies it you may make a false statement. For instance, if, pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement" (*h*).

And, if a statement has been made which is true at the time but in the course of the negotiations between the parties becomes

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(*e*) *Behn* v. *Burness*, 3 B. & S., at p. 753; 32 L. J. Q. B. 204; 124 R. R. 794. The difference between a condition and a warranty will be explained later.

(*f*) *Peek* v. *Gurney*, L. R. 6 H. L., at p. 403; 43 L. J. Ch. 19.

(*g*) *Schneider* v. *Heath*, 3 Camp. 506; 14 R. R. 825; *Udell* v. *Atherton*, 7 H. & N. 172; 30 L. J. Ex. 337; 126 R. R. 383.

(*h*) *Arkwright* v. *Newbold*, 17 Ch. D., at p. 318; 50 L. J. Ch. 372.

untrue, then there is an obligation to correct such erroneous statement (*i*).

But mere silence, or non-disclosure, as distinct from telling half the truth, or failure to correct a statement which has become untrue, is not misrepresentation, unless it relates to some material fact which there is a duty to disclose it (*k*).

A duty to disclose all material facts exists in all contracts *uberrimæ fidei, i.e.*:—

i. Family settlements (*l*) and compromises of disputes (*m*).

ii. Transactions between persons in a fiduciary relationship to each other; *e.g.*, between companies and their directors or promoters (*n*), solicitors and their clients (*o*), or partners (*p*).

iii. All contracts of insurance (*q*).

iv. (To some extent) contracts for the sale of land. A *vendor* of real estate is presumed to be selling the property free from encumbrances or restrictions, except so far as he has given notice to the contrary (*r*), and must disclose any material defect in title or in the subject of the sale which the purchaser could not discover by the exercise of reasonable care (*s*). But no duty of disclosure rests upon a *purchaser* unless he is in a fiduciary

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(*i*) *Davies* v. *London, etc., Insurance Co.*, 8 Ch. D., at p. 475; 47 L. J. Ch. 511; 38 L. T. 478.

(*k*) *Peek* v. *Gurney*, L. R. 6 H. L., at p. 390; 43 L. J. Ch. 19; *Ward* v. *Hobbs*, 4 A. C., at p. 26; 48 L. J. Q. B. 281; 40 L. T. 73; *Turner* v. *Green*, [1895] 2 Ch., at p. 208; 64 L. J. Ch. 539.

(*l*) *Maynard* v. *Eaton*, L. R. 9 Ch., at p. 422; 43 L. J. Ch. 641; 30 L. T. 241.

(*m*) *Gordon* v. *Gordon*, 3 Swanst. 463; 19 R. R. 230.

(*n*) *Erlanger* v. *New Sombrero, etc., Co.*, 3 A. C., at p. 1244; 39 L. T. 269; 48 L. J. Ch. 73.

(*o*) *Macpherson* v. *Watt*, 3 A. C., at p. 266.

(*p*) 3 A. C. at p. 1244. As to all these cases and other illustrations of this principle, see also *Davies* v. *London, etc., Insurance Co.*, at p. 474; 47 L. J. Ch. 511; 38 L. T. 478.

(*q*) *London Assurance* v. *Mansel*, 11 Ch. D. 363; 48 L. J. Ch. 331; 41 L. T. 225; *Seaton* v. *Heath*, [1899] 1 Q. B., at p. 782; 68 L. J. Q. B. 631; 80 L. T. 579; 15 T. L. R. 297; Marine Insurance Act, 1906, s. 18.

(*r*) *Re Cox & Neve*, [1891] 2 Ch., at pp. 116, 117; 64 L. T. 733; *Re Ebsworth & Tidy*, 42 Ch. D., at p. 47; 58 L. J. Ch. 665; 60 L. T. 841.

(*s*) *Carlish* v. *Salt*, [1906] 1 Ch., at pp. 340, 341; 75 L. J. Ch. 175; 94 L. T. 58. See also *Molyneux* v. *Hawtrey*, [1903] 2 K. B. 487; 72 L. J. K. B. 873; 89 L. T. 350.

relationship to the vendor (*t*) or has, unknown to the vendor, done acts which have altered their position with regard to the property, *e.g.*, has trespassed upon a mine and raised coal (*u*).

2. *It must be a misstatement of fact, i.e.*:—

i. *Not of law*—that is to say, not of a general rule of law (*x*); but a misstatement of mixed fact and law (*y*) may amount to a misrepresentation, or a misstatement as to the effect of a deed (*z*), or as to the meaning of a written agreement (*a*), or of a private Act of Parliament (*b*), or as to any private rights (*c*).

ii. *Nor of mere opinion, intention, or expectation.*—A mere exaggeration upon what is entirely a matter of opinion is not a misrepresentation (*d*). And a statement relating solely to *future* conduct can take effect only as a promise forming one of the *terms* of a contract. But a statement of opinion, intention, or expectation *may* necessarily involve a representation of fact (*e*). Thus a statement that a hotel is let to a "most desirable tenant" involves a misrepresentation of fact if the tenant is insolvent and only pays rent by driblets and under pressure (*f*). And a state-

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(*t*) *Coaks* v. *Boswell*, 11 A. C., at p. 235; 55 L. J. Ch. 761; 55 L. T. 32; *Haygarth* v. *Wearing*, L. R. 12 Eq. 320; 40 L. J. Ch. 577.

(*u*) *Phillips* v. *Homfray*, [1892] 1 Ch. 465; 61 L. J. Ch. 210; 66 L. T. 657. To the above are sometimes added contracts for the sale of shares in companies, and contracts of guarantee and suretyship. In the first case there is, under s. 81 of the Companies (Consolidation) Act, 1908, a statutory obligation to disclose certain facts, but, apart from this, the contract does not appear to be *uberrimæ fidei* (*Aaron's Reefs* v. *Twiss*, [1896] A. C., at p. 287; 65 L. J. P. C. 54 : *McKeown* v. *Boudard & Co.*, 65 L. J. Ch. 735; 74 L. T. 712. There are, however, earlier *dicta* to the contrary). As to contracts of guarantee and suretyship, see *post*, Part II., Chapter II.

(*x*) *Rashdall* v. *Ford*, L. R. 2 Eq. 750; 35 L. J. Ch. 769.

(*y*) *I.e.*, a statement of fact which involves a conclusion of law. Thus, to state that a man is married or entitled to property involves a conclusion of law, but is a statement of fact (see judgment of Jessel, M.R., in *Eaglesfield* v. *Londonderry*, 4 Ch. D., at p. 702; 35 L. T. 822).

(*z*) *Hirschfield* v. *L. B. & S. C. Railway*, 2 Q. B. D. 1; 46 L. J. Q. B. 94; 35 L. T. 473.

(*a*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; 66 L. J. Ch. 684; 77 L. T. 57.

(*b*) *West London, etc., Bank* v. *Kitson*, 13 Q. B. D. 360; 53 L. J. Q. B. 345.

(*c*) *Cooper* v. *Phibbs*, L. R. 2 H. L., at p. 170; 16 L. T. 678.

(*d*) *Anderson* v. *Pacific Insurance Co.*, L. R. 7 C. P. 65; 26 L. T. 130.

(*e*) *Bisset* v. *Wilkinson*, [1927] A. C. 177; 96 L. J. P. C. 12.

(*f*) *Smith* v. *Land, etc., Corporation*, 28 Ch. D. 7; 51 L. T. 718. But mere "puffing," *i.e.*, exaggerated praise by a vendor, does not, except in extreme cases, amount to misrepresentation. See *Dimmock* v. *Hallett*, L. R. 2 Ch., at p. 27; 36 L. J. Ch. 146; 15 L. T. 374; *Hope* v. *Walter*, [1900] 1 Ch., at p. 258; 69 L. J. Ch. 166; 82 L. T. 30; 16 T. L. R. 160.

ment by A that he expects to have his house completed next week involves a representation that he has a house which is near completion (*g*).

3. It must be *made to induce the plaintiff to act*.—Thus, as a general rule, when shares are bought upon the market and not taken by allotment from a company, misstatements in the prospectus of the company cannot be relied on by a purchaser, because the purpose of a prospectus is to invite persons to become original allottees, and having done this its effect is exhausted (*h*). But this rule does not apply if a prospectus has been used as part of a system of misrepresentations in order to induce a person to buy in the open market (*i*).

4. *It must have induced the plaintiff to act*.—The plaintiff must prove that he was deceived by the representation (*k*), and that it actually induced him to act (*l*), though it need not have been the sole inducement (*m*). It is, therefore, a good defence that the plaintiff did not rely at all upon the representations, but acted solely on his own enquiries (*n*); but, if the plaintiff relied upon the representations, it is no defence to prove merely that he had the means of discovering the truth (*o*).

5. *It must be made by the other party to the contract or by his agent* (*p*).

(*g*) *Aaron's Reefs, Ltd.* v. *Twiss*, [1896] A. C., at p. 283; 64 L. J. P. C. 54; 74 L. T. 794. The *dictum* in *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459; 55 L. J. Ch. 650; that "A state of a man's mind is as much a fact as the state of his digestion," must be read subject to the qualifications stated in the text; see *Yorkshire Insurance Co.* v. *Craine*, [1922] 2 A. C., at p. 553; 91 L. J. P. C. 226; 38 T. L. R. 845; but compare *Bisset* v. *Wilkinson* (*ubi supra*).

(*h*) *Peek* v. *Gurney*, L. R. 6 H. L. 377; 43 L. J. Ch. 19.

(*i*) *Andrews* v. *Mockford*, [1896] 1 Q. B. 372; 65 L. J. Q. B. 302.

(*k*) *Horsfall* v. *Thomas*, 1 H. & C. 90; 31 L. J. Ex. 322; 130 R. R. 394. (The defendant actively concealed a defect in a gun sold to the plaintiff, who did not examine it, and therefore was not in fact deceived.) See also *Macleay* v. *Tait*, [1906] A. C., at p. 31; 75 L. J. Ch. 90.

(*l*) *Nash* v. *Calthorpe*, [1905] 2 Ch. 237; 74 L. J. Ch. 493; 21 T. L. R. 587; 93 L. T. 585; *Smith* v. *Chadwick*, 9 A. C. 187; 52 L. J. Ch. 873; 50 L. T. 697.

(*m*) *Edgington* v. *Fitzmaurice*, 20 Ch. D., at p. 466; 55 L. J. Ch. 650; 53 L. T. 369.

(*n*) *Redgrave* v. *Hurd*, 20 Ch. D., at pp. 13, 21; 51 L. J. Ch. 113; 45 L. T. 485.

(*o*) *Dobell* v. *Stevens*, 3 B. & C. 263; 3 L. J. K. B. 89; 27 R. R. 441; *Central Railway of Venezuela* v. *Kisch*, L. R. 2 H. L., at pp. 120, 121; 36 L. J. Ch. 849; 16 L. T. 500; *Nocton* v. *Ashburton*, [1914] A. C., at p. 962; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602.

(*p*) *Wheelton* v. *Hardisty*, 8 E. & B. 232; 26 L. J. Q. B. 265; *Re Metal Constituents, Ltd.*, [1902] 1 Ch. 707; 71 L. J. Ch. 323; 86 L. T. 291.

Fraud.—To constitute fraud there must be an *active misrepresentation* (*q*) (as distinct from non-disclosure) made "(1) *knowingly, or* (2) *without belief in its truth, or* (3) *recklessly, careless whether it be true or false*" (*r*). It is not fraud to make a false statement merely through want of care, nor to make a false representation which is honestly believed in, though upon insufficient grounds (*s*). "But if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made" (*t*).

Remedies for misrepresentation and fraud.—For fraud, whether or not connected with a contract, the Common Law gave the action of deceit, which was an action of tort for damages. For an innocent misstatement the Common Law could give no remedy unless it had been embodied in a contract as one of its terms, so that an action for breach of contract would lie (*u*).

Equity would refuse specific performance of a contract induced by misrepresentation, and, if the misrepresentation was fraudulent or material, would rescind the contract. Also, though it could not give damages, it would compel the defendant to make restitution or to compensate the plaintiff by putting him in as good a pecuniary position as he was before the injury (*x*), or to indemnify him against the consequences of the transaction set aside, *e.g.*, against the debts and liabilities of a partnership which was dissolved (*y*).

Since the Judicature Act, 1873, the rules of Equity have prevailed and misrepresentation, if fraudulent or material, is a ground for rescission in all Courts. When rescission is sought on the ground of fraud "it is enough to show that there was a fraudulent representation as to any part of that which induced the

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(*q*) *Peek* v. *Gurney*, L. R. 6 H. L., at p. 603; 43 L. J. Ch. 19.
(*r*) *Derry* v. *Peek*, 14 A. C., at p. 374; 58 L. J. Ch. 864; 61 L. T. 265.
(*s*) *Id.*, at p. 375.
(*t*) *Id.*, at p. 314; *Smith* v. *Chadwick*, 9 A. C., at p. 201; 52 L. J. Ch. 873; see *Polhill* v. *Walter*, 3 B. & Ad. 114; 1 L. J. K. B. 92; 37 R. R. 344.
(*u*) See *Behn* v. *Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; 124 R. R. 794; see also *Kennedy* v. *Panama, etc., Mail Co.*, L. R. 2 Q. B. 580; 36 L. J. Q. B. 260; 17 L. T. 62.
(*x*) *Nocton* v. *Ashburton*, [1914] A. C., at p. 952; 83 L. J. Ch. 784.
(*y*) *Newbigging* v. *Adam*, 34 Ch. D., at pp. 589, 592-3; 56 L. J. Ch. 275.

party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation . . . it does not authorise a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken" (*z*). And, following the Equity rules, the defendant, though his misrepresentation was innocent, may be compelled to compensate or indemnify the plaintiff (*a*). But, following the Common Law rules, damages cannot be given unless the misrepresentation was fraudulent, except:

i. On a warranty of authority, *i.e.*, where an agent, however innocently, misrepresents the nature or extent of his authority (*b*).

ii. Under *s.* 81 of the *Companies (Consolidation) Act*, 1908. This section requires certain matters therein specified to be set out in any prospectus issued by a company or by any person engaged or interested in the formation of a company. Non-compliance with the section will give to any person who has suffered damage thereby the right to recover damages from the person responsible (*c*) unless he was not cognisant of the matter not disclosed or the non-compliance arose from an honest mistake of fact on his part.

iii. Under *s.* 84 of the *Companies (Consolidation) Act*, 1908 (*d*). By this section a director or promoter of a company and any person who has authorised the issue of a prospectus is liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, unless it is proved—

(a) That he had reasonable ground to believe and did believe that the statement was true, and

(b) If the untrue statement purported to be a statement by, or the report or valuation of, an expert, that it fairly represented the statement, or was a correct and fair

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(*z*) *Kennedy* v. *Panama, etc., Mail Co.*, L. R. 2 Q. B., at p. 587.

(*a*) See *Nocton* v. *Ashburton* (*ubi supra*) for explanation.

(*b*) See *post*, Part II., Chapter I.

(*c*) *Re South of England Natural Gas, etc., Co.*, [1911] 1 Ch. 573; 80 L. J. Ch. 358; 104 L. T. 378. But he is not thereby entitled to rescind a contract to take shares (*Id.*).

(*d*) Re-enacting the provisions of the Directors' Liability Act, 1890.

copy of the report or valuation, *unless* it is proved that he had no reasonable ground to believe that the person making the statement, report or valuation was competent to make it, and

(c) If the untrue statement purported to be a statement made by an official person or contained in a public document, that it fairly represented such statement or was a correct and fair copy of the document;

or unless it is proved—

(a) That before the issue of the prospectus he withdrew his consent to become a director, or

(b) That the prospectus was issued without his knowledge and consent and that he gave reasonable public notice that it was so issued, or

(c) That, before any allotment under the prospectus, he, on becoming aware of any untrue statement therein, withdrew his consent thereto, and gave reasonable public notice of the withdrawal and of the reason therefor.

Conditions under which rescission cannot be obtained.—Where a contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, rescission cannot be obtained unless the misrepresentation was fraudulent or a fiduciary relationship existed between the parties (*e*).

No contract can be rescinded—

1. Where *restitutio in integrum* is impossible. Thus a person who has been induced to buy shares in a company cannot repudiate them after the nature and constitution of the company have been altered (*f*).

2. Where the rights of third persons have intervened. Thus, as has been pointed out, if A is induced by misrepresentation to sell goods to B, he cannot avoid the contract after B has sold

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(*e*) *Seddon* v. *N. E. Salt Co.*, [1905] 1 Ch. 326; 74 L. J. Ch. 199; 91 L. T. 793; 21 T. L. R. 118; *Angel* v. *Jay*, [1911] 1 K. B. 666; 80 L. J. K. B. 458; 103 L. T. 809; *Armstrong* v. *Jackson*, [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444. This rule does not, however, apply to contracts for the sale of shares in a company (*Armstrong* v. *Jackson* (*ubi supra*)).

(*f*) *Clarke* v. *Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; 113 R. R. 583. But the mere fact that the subject-matter of the contract has depreciated in value does not destroy the right to rescind (*Armstrong* v. *Jackson* (*ubi supra*)).

the goods to an innocent sub-purchaser (*g*). And though a person who has by misrepresentation induced a contract cannot enforce it, other persons may, in consequence of it, acquire rights and interests which they may enforce against the party who has been so induced to enter into it (*h*).

3. Where the plaintiff, with knowledge of his rights, has affirmed the contract either by express words or by unequivocal acts (*i*), as, *e.g.*, by exercising acts of ownership over property which he has bought on the faith of a misrepresentation (*k*).

4. Where the plaintiff has been guilty of laches, *i.e.*, of such delay that it would be inequitable to grant him the remedy of rescission. Laches is not, however, constituted by mere delay, but only by delay of such a length or in such circumstances, or accompanied by such conduct as either to raise the inference that the plaintiff has waived his right or to affect the position of the defendant and to put him in a situation in which it would not be reasonable to put him if the remedy were afterwards to be asserted (*l*).

Equitable Fraud.—In Equity the term "fraud" was applied generally to unfair dealings and to breach of duty by persons in fiduciary positions, particularly where property or any benefit had been obtained by any unconscientious exercise of power or influence. In such cases Equity would grant the same remedies as if there had been actual misrepresentation (*m*).

The chief illustrations of equitable fraud are—

1. *Unconscionable bargains*, in which advantage has been taken of the weakness or necessity of a person who has acted without adequate protection (*n*), as, for instance, dealings with

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(*g*) *Phillips* v. *Brooks*, *ante*, p. 84; and *post*, p. 97.

(*h*) *Oakes* v. *Turquand*, L. R. 2 H. L. 325; 36 L. J. Ch. 949.

(*i*) *Abram Steamship Co.* v. *Westville Shipping Co.*, [1923] A. C. 773; 93 L. J. P. C. 38.

(*k*) *Scholey* v. *Central, etc., Railway*, L. R. 9 Eq., at p. 266, n. 3.

(*l*) *Erlanger* v. *New Sombrero, etc., Co.*, 3 A. C., at p. 1279; 39 L. T. 269; 48 L. J. Ch. 73; *Blake* v. *Gale*, 32 Ch. D., at p. 581; 55 L. J. Ch. 559; 55 T. L. R. 234; *Re Eustace*, [1912] 1 Ch. 561; 81 L. J. Ch. 529; 106 L. T. 789; *Armstrong* v. *Jackson* (*ubi supra*).

(*m*) *Nocton* v. *Ashburton*, [1914] A. C., at p. 952; 83 L. J. Ch. 748; 111 L. T. 641; 30 T. L. R. 602.

(*n*) See *O'Rorke* v. *Bolingbroke*, 2 A. C., at p. 823; *Fry* v. *Lane*, 40 Ch. D. 312; 58 L. J. Ch. 113; 60 L. T. 12; and see, as to equitable fraud, Wilshere's Equity, Chapter X., s. 2.

expectant heirs on the security of their interests or on the credit of their expectations (*o*). A sale of a *remainder or reversion* at an undervalue could formerly be set aside on that ground alone. But by s. 174 of the *Law of Property Act*, 1925 (re-enacting in substance the Sales of Reversions Act, 1867), it is provided that no purchase, made *bona fide* and without fraud, of any reversionary interest shall be set aside *merely* on the ground of undervalue. But undervalue may still be so great as to be *evidence* of fraud (*p*).

In the case of unconscionable loans Equity would so far avoid the transaction as to compel the lender to be satisfied with the sum advanced and fair interest. Excessive interest alone was not formerly an equitable ground for setting aside a bargain, though it might be *void* under the usury laws until their repeal in 1854 (*q*). But now, by s. 1 of the *Moneylenders Act*, 1900, *any* Court in which proceedings are or might be taken for the recovery of money lent by a *moneylender* (*r*) may reopen the transaction and any account already taken between them (*s*), and may set aside or vary any security or agreement, and may relieve the debtor from payment of any sum in excess of what is fairly due in respect of principal, interest, and charges, having regard to the risk and all the circumstances, *provided that the interest or the amount of any charges is excessive* and *the transaction is harsh and unconscionable* or *is otherwise such that a Court of Equity would give relief.*

Under this Act the Court may give relief to a borrower if the transaction is harsh and unconscionable, although it is not a case in which Equity would have given relief. And an excess of

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(*o*) See *Aylesford* v. *Morris*, L. R. 8 Ch. 484; 42 L. J. Ch. 546; 28 L. T. 541.

(*p*) *Fry* v. *Lane* (*ubi supra*).

(*q*) See *Neville* v. *Snelling*, 15 Ch. D., at pp. 702, 703; 49 L. J. Ch. 777; 43 L. T. 244; *Re a Debtor*, [1903] 1 K. B., at p. 709; 72 L. J. K. B. 382; 88 L. T. 401; 19 T. L. R. 288.

(*r*) *I.e.*, a person whose business is that of money-lending, or who advertises or holds himself out as carrying on that business (s. 6).

(*s*) This section does not, however, enable a Court to reopen previous transactions which have been the subject-matter of a former action, in which judgment has been given, even though the judgment was the result of an agreement (*Cohen* v. *Jonesco*, [1926] 1 K. B. 119; 95 L. J. K. B. 100; 42 T. L. R. 41; reversed in C. A. without discussing this question, [1926] 2 K. B. 1; 95 L. J. K. B. 467; 42 T. L. R. 294).

interest, unless the lender can show that the contract is not in fact "harsh and unconscionable," may of itself be sufficient to entitle the debtor to relief (*t*).

The Act also provides that a moneylender must register his name and the address where he carries on business, and must carry on business only in his registered name and at his registered address (*u*).

Failure to comply with these conditions renders any contract *void* (*x*), and the borrower has a legal right to a declaratory judgment that a mortgage is void, without being put upon any terms as to repayment (*y*); but if the borrower also asks for equitable relief, as *e.g.*, for the recovery of any money paid or the return of any security deposited by him, he is entitled to succeed only upon the equitable terms of making repayment of the money actually received by him (*z*).

The grant of equitable relief against unconscionable bargains was not limited to transactions with expectant heirs, and any dealings with ignorant or illiterate persons may be set aside if they did not understand the nature of the transaction, as, for instance, an improvident sale of property by a vendor who, through ignorance or inexperience, was not on equal terms with the purchaser (*a*).

2. *Transactions in which benefit has been obtained by undue influence.*—Whenever parties stand in a fiduciary or confidential

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(*t*) *Samuel* v. *Newbold*, [1906] A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209.

(*u*) S. 2. See *Kirkwood* v. *Gadd*, [1910] A. C. 422; 79 L. J. K. B. 815; *Whiteman* v. *Sadler*, [1910] A. C. 514; 79 L. J. K. B. 1050; *Whiteman* v. *Director of Public Prosecutions*, [1911] 1 K. B. 824; 80 L. J. K. B. 681; *Shaffer* v. *Sheffield*, [1914] 2 K. B. 1; 83 L. J. K. B. 817; 110 L. T. 1023; 30 T. L. R. 276; *Vorst* v. *Goldstein*, [1924] 2 K. B. 372; 93 L. J. K. B. 965; 131 L. T. 569.

(*x*) *Victorian Syndicate* v. *Dott*, [1905] 2 Ch. 624; 74 L. J. Ch. 673; 93 L. T. 627; 21 T. L. R. 742; *Bonnard* v. *Dott*, [1906] 1 Ch. 740; 75 L. J. Ch. 446; 94 L. T. 656; *Cornelius* v. *Phillips*, [1918] A. C. 199; 87 L. J. K. B. 246; 118 L. T. 228; 34 T. L. R. 116. But by s. 1 of the Moneylenders Act, 1911, protection is given to a *bona fide* assignee of any agreement with a moneylender, and to any *bona fide* holder for value, without notice of any defect due to the operation of s. 2 of the Act of 1900, of any security taken by a moneylender, and to any person who *bona fide* pays money or transfers property on the faith of any such agreement or security, without notice of any defect. Nothing, however, in this section renders valid an agreement or security in favour of an assignee or holder for value who is himself a moneylender.

(*y*) *Chapman* v. *Michaelson*, [1909] 1 Ch. 238; 78 L. J. Ch. 272; 100 L. T. 109; 25 T. L. R. 101.

(*z*) *Lodge* v. *National Investment Co.*, [1907] 1 Ch. 300; 96 L. J. Ch. 187.

(*a*) See summary of cases in *Fry* v. *Lane* (*ubi supra*).

relationship, "the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the position and mutual relation of the parties, whether in matters of contract or gift; and, this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position the burden of showing that he has not used it to his own benefit" (*b*).

Duress.—When a person contracts under duress the contract is voidable (*c*). Duress consists in actual or threatened violence to, or unlawful imprisonment of, the contracting party or his wife, parent or child, inflicted or threatened by the other party to the contract or by someone acting with his knowledge or consent (*d*).

The illegal taking and detaining of goods, or threats of injury to goods, do not constitute duress sufficient to avoid a contract (*e*); but money paid to recover goods unlawfully detained (*f*), or obtained by extortion (*g*), or by abuse of legal process (*h*) can be recovered as money received to the plaintiff's use, on the ground of its having been paid without any legal consideration and involuntarily (*i*).

Section 2.—*Mistake.*

The fact that a person has acted or contracted under a mistake on his own part, not caused by any misrepresentation, does not, as a rule, affect his civil rights or liabilities. Even at Common Law, however, there were two cases in which a mistake of *fact* was material.

(*b*) *Erlanger* v. *New Sombrero Co.*, 3 A. C., at p. 1230; 48 L. J. Ch. 73; 39 L. T. 269. For illustrations of this principle, see Wilshere's Equity, Chapter X., s. 2.

(*c*) *Seear* v. *Cohen*, 45 L. T. 589. See also *Williams* v. *Bayley*, L. R. 1 H. L. 200; 35 L. J. Ch. 717; 14 L. T. 802.

(*d*) Anson's Contracts, p. 182; Bullen & Leake's Pleadings (3rd ed.), p. 566; *Barnes* v. *Richards*, 71 L. J. K. B. 341; 86 L. T. 231; 18 T. L. R. 328.

(*e*) Bullen & Leake (*ubi supra*); *Skeate* v. *Beale*, 11 A. & E. 989; 9 L. J. Q. B. 233; 52 R. R. 558.

(*f*) *Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J. Q. B. 435.

(*g*) *Parker* v. *Great Western Railway Co.*, 7 Man. & G. 253; 13 L. J. C. P. 105; *Ashmole* v. *Wainwright*, 2 Q. B. 837; 11 L. J. Q. B. 79; 57 R. R. 817 (both cases of overcharges paid to carriers).

(*h*) *Duke de Cadaval* v. *Collins*, 4 Ad. & E. 858; 5 L. J. K. B. 171; 43 R. R. 499 (fraudulent use of legal process: a foreigner, ignorant of the English language, being arrested by the defendant upon a claim known to the defendant to be unfounded, and paying a sum of money to obtain release from the arrest).

(*i*) *Ante*, p. 49.

1. Since a contract requires the consent of both parties to the same thing, proof of a mistake might negative the idea of consent and so prevent the *formation* of a contract.

2. Money paid under a mistake of fact might be recovered.

1. **Contracts Affected by Mistake.**—The effect of misrepresentation, as has been already pointed out (*k*), is merely to render a transaction voidable, *i.e.*, good until avoided, so that, before it is avoided, third parties may acquire rights under it. The effect, at Common Law, of mistake, where it had any effect, was to prevent the formation of a contract, so that the transaction was absolutely *void* and third parties could not acquire rights under it. If, therefore, A obtains goods from B as the result of a mistake by B which prevents the formation of a contract, A has *no* title and can pass no title to a third party (*l*).

The cases in which, at Common Law, mistake prevents the formation of a contract are as follows:—

(i) Where there is a common mistake of both parties as to the existence of something which is the basis of the agreement, *e.g.*, an agreement for the sale of a life policy made under a mistaken belief by both parties that the assured was alive (*m*), or an agreement for the sale of a cargo which, at the time of the contract, was no longer in existence (*n*).

(ii) Where there is a mistake by both parties as to the identity of the subject-matter of the agreement (*o*).

(*k*) *Ante*, p. 84.

(*l*) See *Cundy* v. *Lindsay*, 3 A. C. 459; 47 L. J. Q. B. 481. The distinction is "between the case of a man who, being deceived (by misrepresentation), enters into a contract, and that of a man who, being also deceived (by his own mistake), does not enter into a contract" (*id.*, at p. 461).

(*m*) *Scott* v. *Coulson*, [1903] 2 Ch. 249; 72 L. J. Ch. 600; 19 T. L. R. 440. In this case the contract had been actually completed by the assignment of the policy, but it was held that an assignment made under such a mistake could not be supported, and that the vendor was entitled to have it rescinded (cp. *Jones* v. *Clifford*, 3 Ch. D., at p. 790; 45 L. J. Ch. 809). It has been already noted (*ante*, p. 91) that a different rule applies in cases of innocent misrepresentation.

(*n*) *Couturier* v. *Hastie*, 5 H. L. 673; 25 L. J. Ex. 253; 101 R. R. 329. See now s. 6 of the Sale of Goods Act, 1893, *post*, Part II., Chapter IV.

(*o*) *Hickman* v. *Berens*, [1895] 2 Ch. 638; 64 L. J. Ch. 785; 73 L. T. 323 (common mistake by counsel effecting a compromise as to the extent of the matters to be affected); *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160; 133 R. R. 853 (sale of a cargo in a ship named *Peerless*; the vendor meant a *Peerless* sailing in December, the purchaser meant a *Peerless* sailing in

(iii) Where one party enters into an agreement through a mistake as to the identity of the other party. Thus, a man named Blenkarn obtained goods on credit from C, by signing his name to an order, so that it looked like the signature of Blenkiron, who was a customer of C. The goods were sent by C under the belief that he was sending to Blenkiron, and not intending to contract with anyone else. Blenkarn sold the goods to X. It was held that the transaction was void, that Blenkarn had no title and could pass none to X (*p*).

But this last rule applies only where the identity of the other party is material, so that the agreement would not have been made but for the mistake (*q*). It does not, therefore, apply where a seller intends to contract with a person who is present, and there is no error as to the person with whom he contracted, although he would not have made the contract but for a fraudulent misrepresentation. Thus, A went into a jeweller's shop and selected a ring and other jewels. He then produced a cheque-book and wrote out a cheque. In signing it he said, "You see who I am, I am Sir G. B.," and he gave the address which the vendor, on reference to a directory, found to be the address of Sir G. B. He was allowed to take the ring, but the cheque was dishonoured, and he was subsequently convicted of obtaining the ring by false pretences. In the meantime he had pledged the ring to X, who had advanced money in good faith and without notice. It was held that the property had passed to A, so that he could give a good title to X (*r*).

(iv) Where a person signs a document under a mistake as to its nature. Thus, A signed a document, which was a guarantee by him to pay B & Co., who were C's bankers, any sum due to them from C on the balance of his general account. A, when

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October). *Held*, that there was no *consensus ad idem*, and therefore no contract. Cp. *Scriven* v. *Hindley*, [1913] 3 K. B. 564; 109 L. T. 526; 88 L. J. K. B. 42.

(*p*) *Cundy* v. *Lindsay*, 3 A. C. 459; 47 L. J. Q. B. 481. Cp. *Boulton* v. *Jones*, 2 H. & N. 564; 27 L. J. Ex. 117; 115 R. R. 695.

(*q*) *Smith* v. *Wheatcroft*, 9 Ch. D., at p. 230; 47 L. J. Ch. 745; 39 L. T. 103. Cp. *Said* v. *Butt*, [1920] 3 K. B. 497; 90 L. J. K. B. 239; 124 L. T. 413; 36 T. L. R. 762.

(*r*) *Phillips* v. *Brooks, Ltd.*, [1919] 2 K. B. 243; 88 L. J. K. B. 953; 121 L. T. 249; 35 T. L. R. 470.

sued by B & Co., set up as his defence that C had obtained his signature by representing that the document, which he had signed without reading it, had reference to an entirely different transaction. It was held that the document was void (*s*).

It must be noted that this rule applies only where there is a mistake as to the nature of the document, not where the party knows the nature of the document but is mistaken as to its effect or the nature of his obligations. "When a man knows he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, or has such confidence in his solicitor as to execute the deed in ignorance, then in my opinion a deed so executed, though it may be voidable on the ground of fraud, is not a void deed" (*t*).

(v) Where one party to a contract is mistaken as to a term of the contract *and his mistake is known to the other party*. Thus, A sees some oats in B's shop, and buys them simply as oats, thinking they are old oats, whereas, in fact, they are new oats. Here, unless there is any misrepresentation by B, the sale is good, even though B knew of A's mistake, the contract being only for *oats* and the mistake being as to the nature or quality of the subject-matter of the contract, and not as to one of the terms of the contract.

If A buys the oats thinking that B *is selling them as old oats*, *i.e.*, that the *contract* is for *old oats*, the sale is still good unless B knew of A's mistake. If B did not know of the mistake, he

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(*s*) *Carlisle, etc., Banking Co.* v. *Bragg*, [1911] 1 K. B. 489; 80 L. J. K. B. 472; 104 L. T. 121. Cp. *Thoroughgood's Case*, 2 Co. Rep. 9 (*b*); *Foster* v. *McKinnon*, L. R. 4 C. P. 70; 38 L. J. C. P. 310; *Lewis* v. *Clay*, 67 L. J. Q. B. 224; 77 L. T. 653; *Bagot* v. *Chapman*, [1907] 2 Ch. 222; 76 L. J. Ch. 523; 23 T. L. R. 562. Though, however, the document is void, the person signing it may, if he was negligent in signing, be estopped from denying its validity *as against a person to whom he owed a duty to be careful*, as, *e.g.*, where by a mistake due to his negligence he has endorsed a negotiable instrument which is subsequently transferred to a holder in due course; see *Foster* v. *McKinnon*, *Lewis* v. *Clay*, and *Carlisle, etc., Banking Co.* v. *Bragg* (*ubi supra*).

(*t*) *Hunter* v. *Walters*, L. R. 7 Ch., at p. 88; 41 L. J. Ch. 175; 25 L. T. 765; affirmed in *King* v. *Smith*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 83 L. T. 815; 16 T. L. R. 410. See also *Howatson* v. *Webb*, [1908] 1 Ch. 1; 77 L. J. Ch. 32; 97 L. T. 730.

has the right to insist that A shall be precluded from denying his apparent consent. But if B knew of the mistake, he cannot insist that A shall be bound by that which was the apparent and not the real bargain (*u*).

Equity may, on the ground of hardship, refuse specific performance of a contract entered into by mistake, and will also in some cases set aside a transaction induced by the mistake of one or both parties (*x*). And Equity, going beyond the Common Law, has power to relieve against a mistake of *law*, provided that the mistake is one as to private rights only, and not as to the general law of the country. But in the absence of any other circumstance, such as misrepresentation or equitable fraud, a mere mistake as to "general law, the ordinary law of the country," is not in general a ground for equitable relief (*y*). But if parties contract or deal with their property under a mistake as to their private rights, as, *e.g.*, through an erroneous construction of a doubtful grant, Equity may set aside the transaction for such a mere mistake of law without the admixture of any other circumstances (*z*).

2. **Money Paid under a Mistake.**—Here an action for money had and received lay at Common Law on the ground that there was a total failure of consideration for the payment (*a*). But the payment must have been under a mistake of fact, which led the

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(*u*) *Smith* v. *Hughes*, L. R. 6 Q. B. 597; 40 L. J. Q. B. 221.

(*x*) *Bingham* v. *Bingham*, 1 Ves. sen. 126. See *Huddersfield Banking Co.* v. *Lister*, [1895] 2 Ch. 273; 64 L. J. Ch. 523; 72 L. T. 703 (consent order set aside on the ground of common mistake as to the subject). Cp. *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; 66 L. J. Ch. 684; 77 L. T. 57.

(*y*) The extent of this rule is somewhat doubtful. It has been stated more than once that Equity has power to relieve against mistakes of law, in the sense of general law. See *Stone* v. *Godfrey*, 5 De G. M. & G., at p. 90; 23 L. J. Ch. 769; 104 R. R. 32; *Allcard* v. *Walker*, [1896] 2 Ch., at p. 381; 65 L. J. Ch. 660; 74 L. T. 487; *McCarthy* v. *Decaix*, 2 Russ. & My. 614; 9 L. J. Ch. 180; 37 R. R. 250 (approved in *Daniell* v. *Sinclair*, 6 A. C., at p. 191); 50 L. J. P. C. 50; 44 L. T. 257. The rule, moreover, does not altogether apply to money paid under a mistake of general law (see next paragraph).

(*z*) See, generally, *Cooper* v. *Phibbs*, L. R. 2 H. L. 170; 16 L. T. 678; *Earl Beauchamp* v. *Winn*, L. R. 6 H. L. 223; 38 L. J. Ch. 556; *Daniell* v. *Sinclair* (*ubi supra*).

(*a*) *Kelly* v. *Solari*, 9 M. & W. 54; 11 L. J. Ex. 10; 60 R. R. 666; *Huddersfield Banking Co.* v. *Lister*, [1895] 2 Ch., at p. 281; 64 L. J. Ch. 523; 72 L. T. 703.

payor to suppose he was legally liable to pay (*b*), not under a mistake of law (*c*) or under pressure of legal process (*d*).

There are, however, some cases in which money paid under a mistake of fact cannot be recovered. Thus money so paid to an agent cannot be recovered if he has actually paid it to his principal (*e*); again there are other cases, as to which no general rule has yet been formulated (*f*), in which, on the ground of estoppel or breach of duty, a person who has paid money under a mistake of fact has been held disentitled to recover it (*g*).

Equity extended the Common Law and gives relief if, in the particular case, there is any ground which renders it inequitable that the party receiving the money should retain it (*h*), as, for instance—

i. Where there was any fiduciary relationship or any supervening equity through the conduct of the parties (*i*).

ii. Where the payment was to an officer of the Court, *e.g.*, to a trustee in bankruptcy (*k*).

iii. Where there was any lack of good faith or any unfair advantage taken in obtaining payment (*l*).

So also Equity will reopen a settled account when it was

(*b*) *Strickland* v. *Turner*, 7 Ex. 208; 22 L. J. Ex. 115; 86 R. R. 619; *Re Bodega Co.*, [1904] 1 Ch., at p. 286; 73 L. J. Ch. 198; 89 L. T. 694. See also *King* v. *Stewart*, 66 L. T. 339.

(*c*) That is to say, under mistake of English law (*Bilbie* v. *Lumley*, 2 East, 469; 6 R. R. 479); mistake of foreign law is mistake of fact (*Leslie* v. *Baillie*, 2 Y. & C. 91; 12 L. J. Ch. 153; 60 R. R. 51).

(*d*) *Marriott* v. *Hampton*, 2 Esp. 546; 4 R. R. 439; *Moore* v. *Vestry of Fulham*, [1895] 1 Q. B. 399; 64 L. J. Q. B. 226. But money paid under mistake of law, but under protest and to avoid a threatened seizure of goods, may be recovered (*Maskell* v. *Horner*, [1915] 3 K. B. 112; 84 L. J. K. B. 1752).

(*e*) *Jones* v. *Waring & Gillow, Ltd.*, [1926] A. C., at p. 693; 95 L. J. K. B. 913.

(*f*) *Holt* v. *Markham*, [1923] 1 K. B., at p. 514; 92 L. J. K. B. 406; 128 L. T. 719.

(*g*) See *Jones* v. *Waring & Gillow, Ltd.* (*ubi supra*), where most of these cases are discussed.

(*h*) *Rogers* v. *Ingham*, 3 Ch. D., at p. 357.

(*i*) *Id.*, at p. 356.

(*k*) *Ex p. James*, 9 Ch. 609; 43 L. J. Bk. 107; 30 L. T. 773; *Ex p. Simmons*, 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 439; *Re Brown*, 32 Ch. D. 396; 55 L. J. Ch. 556; 54 L. T. 789; *Re Rhoades*, [1899] 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; *Re Thellusson*, [1919] 2 K. B. 735; 88 L. J. K. B. 1210.

(*l*) *Ward & Co.* v. *Wallis*, [1900] 1 Q. B. 673; 69 L. J. Q. B. 423; 82 L. T. 261; 16 T. L. R. 193.

settled by a misapprehension by both parties as to their legal rights (*m*).

Mistake of Expression. Rectification.

A written contract cannot be impeached merely because one of the parties to it put an erroneous construction on the words in which it was expressed (*n*). But a contract which has by mistake been drawn up so as not to carry out the real intent of the parties may be rectified by putting the instrument into a form which will carry out that intent. But rectification can be obtained only upon the following conditions (*o*):—

i. There must be an actually concluded contract antecedent to the instrument which is sought to be rectified (*p*).

ii. There must be "evidence of a different intention of the clearest and most satisfactory description" (*q*).

iii. There must be a mistake common to both parties (*r*).

iv. The mistake must have existed at the time of the execution of the instrument (*s*).

v. The mistake must be one of expression only. "Courts of Equity do not rectify contracts, though they may and do rectify instruments purporting to have been made in pursuance of contracts" (*t*).

vi. The mistake must be exactly proved. The plaintiff must show the precise form to which the instrument ought to be brought (*u*).

(*m*) *Daniell* v. *Sinclair*, 6 A. C. 181; 50 L. J. P. C. 50; 44 L. T. 257.

(*n*) *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; 66 L. J. Ch. 684; 77 L. T. 57. This principle does not, however, apply where the mistake as to the meaning of the words has been induced, although innocently, by the other party (*Ibid.*).

(*o*) See Wilshere's Equity, Chapter XI., s. 2.

(*p*) *Craddock Brothers* v. *Hunt*, [1923] 2 Ch., at p. 159; 92 L. J. Ch. 378; 129 L. T. 228; *United States* v. *Motor Trucks, Ltd.*, [1924] A. C., at p. 200; 93 L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 273; *Higgins, Ltd.* v. *Northampton Corporation*, [1927] 1 Ch. 128.

(*q*) *Fowler* v. *Fowler*, 4 De G. & J., at p. 264; *Vaudeville Electric Cinema, Ltd.* v. *Muriset*, [1923] 2 Ch. 74; 92 L. J. Ch. 558; 129 L. T. 466; *Craddock Brothers* v. *Hunt* (*ubi supra*).

(*r*) *Stewart* v. *Kennedy*, 15 A. C., at p. 119; *Wilding* v. *Saunderson*, [1897] 2 Ch., at p. 550; 66 L. J. Ch. 684; 77 L. T. 57.

(*s*) *Fowler* v. *Fowler*, 4 De G. & J., at p. 264; 124 R. R. 234.

(*t*) *Mackenzie* v. *Coulson*, L. R. 8 Eq., at p. 375.

(*u*) *Fowler* v. *Fowler* (*ubi supra*).

Where rectification of a contract is sought, oral evidence is not excluded by the Statute of Frauds or any other statute requiring an agreement or memorandum in writing, because the jurisdiction of the Court to rectify is outside the prohibition of such statutes (*x*). And, even where these statutes apply, rectification can be granted of a conveyance on oral evidence of a mistake although it conforms with a written agreement containing the same mistake (*y*).

(*x*) *United States* v. *Motor Trucks, Ltd.*, [1924] A. C., at p. 201; (1923), L. J. P. C. 46; 130 L. T. 129; 39 T. L. R. 273.

(*y*) *Craddock Brothers* v. *Hunt*, [1923] 2 Ch. 136; 92 L. J. Ch. 378; 129 L. T. 228. It was formerly thought that this could not be done because the effect would be to grant specific performance of a contract which, as rectified by the oral evidence, would be partly in writing and partly oral. But the true explanation is that, after rectification, the written agreement does not continue to exist with an oral variation, but is to be read as if it had originally been drawn in its rectified form ([1923] 2 Ch., at p. 151).

CHAPTER IV.

UNLAWFUL AGREEMENTS.

The term "unlawful" is used in two senses: (i) of agreements which are contrary to law as being illegal and punishable, and (ii) of agreements which are contrary to the general policy of the law in the sense that the law will not give effect to them or lend any aid to enforce them (*a*). Agreements of both kinds are void, though they differ as to their effect upon collateral transactions.

An agreement may be unlawful either at Common Law or by statute.

A. **Agreements Unlawful at Common Law.**—An agreement is illegal and void if the object of either the promise or the consideration is to promote the committal of an illegal act (*b*). Thus an agreement to commit anything which amounts to a crime or civil injury is illegal and void, as, for example, an agreement to publish an indecent book (*c*), or to defraud a third party (*d*), or to commit a fraud upon the public (*e*), or to indemnify a person against the result of an illegal act (*f*), or an agreement in fraud of the bankruptcy laws (*g*).

(*a*) *Mogul S.S. Co.* v. *McGregor*, [1892] A. C., at p. 39; 61 L. J. Q. B. 295; 66 L. T. 1.

(*b*) *Herman* v. *Jeuchner*, 15 Q. B. D., at p. 563; 54 L. J. Q. B. 340; 53 L. T. 94.

(*c*) *Poplett* v. *Stockdale*, 2 C. & P. 198; 31 R. R. 662.

(*d*) *Harrington* v. *Victoria Graving Dock*, 3 Q. B. D. 459; 47 L. J. Q. B. 594; 39 L. T. 120. See also *Begbie* v. *Phosphate Sewage Co.*, L. R. 10 Q. B. 491; 1 Q. B. D. 679; 44 L. J. Q. B. 233.

(*e*) *Scott* v. *Brown, Doering & Co.*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782 (agreement to create a fictitious market in shares). An agreement by dealers not to bid at an auction in order to keep down the price of the goods sold is not unlawful (*Rawlings* v. *General Trading Co.*, [1921] 1 K. B. 635; 90 L. J. K. B. 404; 124 L. T. 562; 37 T. L. R. 252).

(*f*) *W. H. Smith & Son* v. *Clinton & Harris*, 99 L. T. 840; 25 T. L. R. 34. But a contract of insurance which protects the assured against the civil consequences of his negligence is not against public policy merely because negligence may in some cases render him guilty of manslaughter (*Tinline* v. *White Cross Insurance Co.*, [1921] 3 K. B. 327; 90 L. J. K. B. 1118; 125 L. T. 632; 37 T. L. R. 733.

(*g*) *Farmers' Mart, Ltd.* v. *Milne*, [1915] A. C. 106; 84 L. J. P. C. 33; 111 L. T. 871.

And although an agreement is not illegal in the sense of being punishable, yet it is equally unlawful and void if it is contrary to morality or public policy. The chief instances of agreements which are void as contrary to morality are agreements relating to future illicit cohabitation.

Any agreement for future illicit cohabitation is void, even though under seal (*h*). An agreement to pay a sum of money in consideration of past cohabitation is founded not upon an unlawful consideration, but upon *no* consideration, the purported consideration being past; accordingly, it is not an unlawful agreement, but is not binding (*i*) unless made under seal (*k*).

Where a man who has been cohabiting with a woman gives her a bond for the payment of money, and afterwards continues to cohabit with her, the mere continuance of the cohabitation does not raise any presumption that the bond was given to secure future cohabitation; but in such a case the bond would be void if it was expressed on its face, or if it could be proved by extraneous evidence, that it was given to secure a continuance of the cohabitation (*l*).

A promise of marriage made by a man who, to the knowledge of the promisee, was married at the time of making the promise is void as being against public morality (*m*).

Agreements contrary to public policy include:

1. Agreements ousting the jurisdiction of the Court, as, for example, an agreement that parties to an arbitration shall be precluded from exercising the right given by the Arbitration Act, 1889, to require the arbitrator to state a special case for the opinion of the Court (*n*). But while parties cannot agree to oust the jurisdiction of the King's Courts, they can agree that no action shall be brought till the amount of liability has been settled by arbitration (*o*). An agreement to refer a dispute to arbitration

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(*h*) See *Ayerst* v. *Jenkins*, L. R. 16 Eq., at p. 282; 42 L. J. Ch. 690.
(*i*) *Beaumont* v. *Reeve*, 8 Q. B. 483; 15 L. J. Q. B. 141.
(*k*) *Gray* v. *Mathias*, 5 Ves. 486; 5 R. R. 48.
(*l*) *Id.*; *Re Vallance*, *Vallance* v. *Blagden*, 26 Ch. D. 353; 50 L. T. 574.
(*m*) *Wilson* v. *Carnley*, [1908] 1 K. B. 729; 77 L. J. K. B. 594; 98 L. T. 265; 24 T. L. R. 277.
(*n*) *Czarnikow* v. *Roth, Schmidt & Co.*, [1922] 2 K. B. 478; 92 L. J. K. B. 81; 127 L. T. 824; 38 T. L. R. 797.
(*o*) [1922] 2 K. B., at p. 489; *Scott* v. *Avery*, 5 H. L. C. 811; 25 L. J. Ex. 303; 101 R. R. 392.

under the Arbitration Act, 1889, does not oust the jurisdiction of the Court but merely enables the Court to stay an action if it is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission to arbitration (*p*).

2. Agreements tending to prejudice the State in its relations with foreign Powers, as, for example, commercial intercourse with an enemy without licence from the Crown (*q*).

3. Agreements tending to interfere with good government and the administration of justice.

Thus, an agreement for the sale of a public office is void at Common Law (*r*). So also an assignment by a public officer of a pension is void, unless given to him exclusively for past services; if a pension is given not exclusively for past services but as a consideration for some continuing service, or the liability to some future service (*s*), or for the support of some dignity (*t*), it is against the policy of the law that it should be assignable. So also an agreement by which a person is hired for money or valuable consideration to use his influence to procure some benefit from the Government is void as against public policy (*u*). So also is an agreement to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity or if some other service is rendered (*x*).

Agreements tending to the abuse of civil process are void, as, for instance, agreements in the nature of maintenance and champerty (*y*). And, similarly, any agreement tending to hinder

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(*p*) 52 & 53 Vict. c. 49, s. 4.

(*q*) *Esposito* v. *Bowden*, 7 E. & B. 763; 24 L. J. Q. B. 210.

(*r*) See *Hopkins* v. *Prescott*, 4 C. B,. at p. 595; 16 L. J. C. P. 259; 72 R. R. 647. There are also express statutory prohibitions.

(*s*) *Wills* v. *Foster*, 8 M. & W. 149.

(*t*) *Davis* v. *Duke of Marlborough*, 1 Swanst. 74; and see notes to *Ryall* v. *Rowles*, 2 White & Tudor, pp. 104, 105.

(*u*) *Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K. B. 241; 87 L. J. K. B. 907; 119 L. T. 340; 34 T. L. R. 463. Where it appears from the evidence that a contract is contrary to public policy it is the duty of the Judge to take the objection that it is illegal and void (*ibid.*).

(*x*) *Parkinson* v. *College of Ambulance, Ltd. and Harrison*, [1925] 2 K. B. 1; 93 L. J. K. B. 1066; 133 L. T. 135; 40 T. L. R. 886.

(*y*) Maintenance, of which champerty is a special form, is also an indictable misdemeanour at Common Law (*Pechell* v. *Watson*, 8 M. & W. 691; 11 L. J. Ex. 225; 58 R. R. 843) and by statute (for list of statutes, see 8 M. & W., at p. 700, and Archbold's Criminal Pleading, p. 1208). It is also actionable as a tort, and will be dealt with later in that aspect (*post*, Part III.). But in

the administration of criminal justice is void, as, for example, an agreement whereby a person who has been ordered to find bail deposits money with his surety in order to indemnify him against any loss which he may suffer (*z*).

An agreement to compound a felony is a Common Law misdemeanour, and is therefore void (*a*); an agreement to compromise a misdemeanour is not a criminal offence, but is also void (*b*), except in cases where the personal interest of the injured party is really alone in question and in which he has the choice between a civil and a criminal remedy, as, for example, in cases of assaults not of an aggravated character (*c*).

Where, however, A justly owes a debt to B and gives B a security, the security is not avoided because the debt was incurred under circumstances which rendered A liable to prosecution and in respect of which B had threatened to prosecute (*d*).

4. Agreements affecting the freedom or security of marriage.

Any agreement which has a tendency to prevent a person from marrying *at all* is void (*e*). But, upon the analogy of *conditions* in restraint of trade, it would seem that a contract in *limited* restraint of *marriage* might be good, *e.g.*, a contract against marriage with a particular class of persons (*f*), or against a second marriage (*g*). A marriage brokage agreement is an agreement to procure or negotiate a marriage for reward, and is void whether the agreement is to procure marriage with one particular person

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order to render an agreement void it is not necessary that it should amount to champerty as an offence (*Rees* v. *De Barnardy*, [1896] 2 Ch. 437; 65 L. J. Ch. 656; 74 L. T. 585; cp. *Reynell* v. *Sprye*, 1 De G. M. & G., at p. 677; 21 L. J. Ch. 633; 91 R. R. 225).

(*z*) *Herman* v. *Jeuchner*, 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94. This principle applies, although the indemnity is given by a person other than the person bailed (*Consolidation Exploration, &c., Co.* v. *Musgrave*, [1900] 1 Ch. 37; 69 L. J. Ch. 11; 81 L. T. 747).

(*a*) Archbold's Criminal Pleading, p. 1214.

(*b*) *Collins* v. *Blantern*, 2 Wilson, 341 (*ante*, p. 27); *Keir* v. *Leeman*, 6 Q. B. 308; 13 L. J. Q. B. 259; 9 Q. B. 371; 15 L. J. Q. B. 360; *Windhill Local Board* v. *Vint*, 45 Ch. D. 351; 59 L. J. Ch. 608.

(*c*) *Keir* v. *Leeman (ubi supra)*; *Fisher & Co.* v. *Apollinaris Co.*, 10 Ch. 297; 44 L. J. Ch. 500; *Jones* v. *Merionethshire Building Society*, [1892] 1 Ch. 173; 61 L. J. Ch. 138; 65 L. T. 685.

(*d*) *Flower* v. *Sadler*, 10 Q. B. D. 572. In this case it was expressly found that there was no *agreement* to compromise criminal proceedings.

(*e*) *Lowe* v. *Peers*, 4 Burr. 2225.

(*f*) *Jenner* v. *Turner*, 16 Ch. D. 188; 50 L. J. Ch. 161.

(*g*) *Allen* v. *Jackson*, 1 Ch. D. 399; 45 L. J. Ch. 310.

or to effect introductions to a number of persons for that purpose (*h*).

Agreements for a possible separation of husband and wife in the future are void, but an agreement for a separation which is intended to take place and does not take place immediately is valid (*i*). And where, while a husband and wife are living apart, a deed is executed by them with the intention of bringing them together again, a provision therein which contemplates a possible future separation is not void (*k*).

5. Agreements in restraint of a man's liberty to carry on his trade or business.

In the case of contracts in restraint of trade (*l*) two principles of the Common Law come into conflict, namely, freedom of trade and freedom of contract (*m*); that conflict, however, the law settles by refusing to enforce agreements when the right to bargain has been used so as to afford more than a *reasonable protection* to the covenantee (*n*).

In the time of Queen Elizabeth (*o*) any agreement by which an individual was restrained from exercising his trade or calling was thought to be contrary to public policy and void. Gradually, however, it was recognised that in some cases an agreement in restraint of trade was legal if it was required for the protection of some lawful interest of the covenantee. Thus, it was held that

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(*h*) *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123; 74 L. J. K. B. 620; 93 L. T. 284; 21 T. L. R. 368.

(*i*) *Cartwright* v. *Cartwright*, 3 De G. M. & G. 989; 22 L. J. Ch. 841; *Hindley* v. *Marquis of Westmeath*, 6 B. & C. 200; 5 L. J. K. B. 115; 30 R. R. 290; *Re Hope Johnstone*, [1904] 1 Ch. 470; 73 L. J. Ch. 321; 90 L. T. 253; 20 T. L. R. 282.

(*k*) *Re Meyrick's Settlement*, [1921] 1 Ch. 311; 90 L. J. Ch. 152; 124 L. T. 531.

(*l*) The chief rules on this subject have been settled by the following cases, from which, except where reference is made to some other authority, the statements in the text are taken: *Nordenfelt* v. *Maxim-Nordenfelt Co.*, [1894] A. C. 535; 65 L. J. Ch. 908; 71 L. T. 489 (sale of a business); *Mason* v. *Provident, &c., Supply Co.*, [1913] A. C. 724; 82 L. J. K. B. 1153; 109 L. T. 449; 29 T. L. R. 727; *Herbert Morris, Ltd.* v. *Saxelby*, [1916] 1 A. C. 688; 85 L. J. Ch. 210; 114 L. T. 618; 32 T. L. R. 297 (contracts between employer and employee; the effect of these two cases is expressed in a series of propositions by Astbury, J., in the case of the *Hepworth Manufacturing Co.* v. *Ryott*, [1920] 1 Ch., at p. 11; 89 L. J. Ch. 69; 122 L. T. 135; 36 T. L. R. 16).

(*m*) [1916] 1 A. C., at p. 699.

(*n*) [1920] 1 Ch., at p. 11.

(*o*) For the history of covenants in restraint of trade, see, in particular, the speech of Lord Herschell, L.C. ([1894] A. C., at p. 541), and of Lord Macnaghten ([1894] A. C., at p. 564).

masters might restrain their apprentices from trading in a certain neighbourhood, that the purchaser of a goodwill of a business might restrain the vendor from trading in a certain area, and that the landlord of a house might restrain his lessee from any use of the house which might lower the value of the property (*p*). But for such a covenant to be enforced it must be (i) for the protection of a lawful interest; (ii) partial; (iii) reasonable; (iv) for adequate consideration.

The distinction between limited and general restraints was settled in 1711 in the case of *Mitchel* v. *Reynolds* (*q*), in which a covenant by a vendor of a business not to carry on the same business in a particular district for five years was held to be valid.

The rule that the restraint must be limited in time was subsequently relaxed, though it was still thought that a restraint unlimited in space could not be reasonable, and was, therefore, always void (*r*). But the changes in the conditions of commerce and the means of communication gradually rendered wider restraints necessary for the reasonable protection of a covenantee (*s*), and in the *Nordenfelt Case* it was settled by the House of Lords that there is no difference in principle between a general and partial restraint, and that even a world-wide restraint may be reasonable and valid. There is, therefore, no longer any distinction in point of law between general and partial restraints (*t*), and a restraint may be valid though unlimited in space or time (*u*), though the generality of time or space must always be a most important factor in the consideration of reasonableness (*x*).

(*p*) See *Hilton* v. *Eckersley*, 6 E. & B., at p. 59; 25 L. J. Q. B. 199; 106 R. R. 507.

(*q*) 1 P. Wms. 181.

(*r*) [1894] A. C., at p. 564.

(*s*) [1894] A. C., at p. 547.

(*t*) [1894] A. C., at p. 548. According to Lord Ashbourne (p. 557) and Lord Macnaghten (p. 564), there never was *in law* any distinction between general and limited restraints, but the former were invalid merely because no one thought that they could be reasonable. Lord Herschell (pp. 546-548) thought that there was a rule of the Common Law distinguishing particular from general restraints, but that it was inapplicable to modern conditions.

(*u*) For examples of restraints unlimited in time, see *Mills* v. *Dunham*, [1891] 1 Ch. 576; 50 L. J. Ch. 362; 64 L. T. 712; *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L. J. Ch. 419; *Dawes* v. *Fitch*, [1920] 2 Ch. 159; 89 L. J. Ch. 499; affirmed by the House of Lords, [1921] 2 A. C. 158; 90 L. J. Ch. 436; 125 L. T. 744; 37 T. L. R. 784. Where a restraint is limited in space the distance is measured "as the crow flies," unless otherwise specified by the parties (*Mouflet* v. *Cole*, L. R. 8 Ex. 32; 42 L. J. Ex. 8).

(*x*) [1894] A. C., at p. 575.

In the two later cases of *Mason* v. *Provident Supply Co.* and *Morris* v. *Saxelby*, the House of Lords have drawn an important distinction between restraints imposed upon the vendor of a business and restraints imposed by an employer upon an employee, and have, therefore, in some respects modified views that were previously accepted (*y*).

The modern rule is this: "All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing else, are contrary to public policy, and are therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of the particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public" (*z*).

Since the restraint is to secure no more than "adequate protection" to the party in whose favour it is imposed, it is necessary to consider in each particular case what it is for which and what it is against which protection is required (*a*).

All restraints of trade being *prima facie* illegal, the covenantee must show the special circumstances entitling him to the protection of the restrictive covenant which he seeks to enforce (*b*).

Thus, no one has an abstract right to be protected against competition *per se* in his business (*c*). But in the case of the sale of the goodwill of a business the vendor, in the absence of a restrictive covenant, could set up in the same kind of business in competition with the purchaser, though he could not solicit his old customers, or represent that he is carrying on the *same* business as that which he has sold (*d*). A covenant excluding this

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(*y*) *Attwood* v. *Lamont*, [1920] 3 K. B., at p. 581.
(*z*) [1894] A. C., at p. 565; further explained in [1913] A. C., at pp. 733, 739; 82 L. J. K. B. 1153; [1916] 1 A. C., at pp. 699, 700; 85 L. J. Ch. 210.
(*a*) [1916] 1 A. C., at p. 708.
(*b*) [1916] 1 A. C., at pp. 707, 715.
(*c*) [1916] 1 A. C., at p. 700.
(*d*) *Trego* v. *Hunt*, [1896] A. C., at p. 27; 65 L. J. Ch. 1; 73 L. T. 514.

is in conformity with public policy, because it protects the property which is sold, enabling the vendor to sell at the best price a business which he has built up by his skill and labour, and which but for such restraint would be useless and at the same time securing to the purchaser all that he has paid for (*e*).

It is quite different, however, in the case of an employer taking a restrictive covenant from his employee or apprentice. The goodwill of his business is subject to the competition of all persons, including a servant or apprentice, who choose to engage in a similar trade. Accordingly such a covenant will not be upheld if directed merely to the prevention of competition, or against the use of the personal skill and knowledge acquired by the employee in his employer's business. The only reason for upholding such a restraint is that the employer has some proprietary right in the nature of trade connection, or in the nature of trade secrets, for the protection of which such a restraint is reasonably necessary, having regard to the duties of the employee, and the extent to which he may obtain personal knowledge of and influence over the customers of his employer or to which he is entrusted by his employers with confidential information (*f*).

If the restraint affords to the person in whose favour it is imposed nothing more than reasonable protection against something which he is entitled to be protected against, then, as between the parties concerned, the restraint is held to be reason-

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(*e*) [1913] A. C., at p. 738; [1916] 1 A. C., at p. 701. But, in an agreement for sale of a business, the subject of protection is only the business which is sold and not any other existing branch or business of the purchaser with which the covenantor has never had any connection, and a restrictive covenant cannot be wider than is necessary for the protection of the particular business sold (*British Concrete Co.* v. *Schelff*, [1921] 2 Ch. 563; 91 L. J. Ch. 114; 126 L. T. 230).

(*f*) [1916] 1 A. C., at pp. 709, 710. An employer is entitled to have his interest in his trade secrets protected, and not to have his old customers enticed away from him; but he must be prepared to encounter competition, even at the hands of a former employee ([1916] 1 A. C., at p. 702). As to the protection of trade secrets, see *Haynes* v. *Doman*, [1899] 2 Ch. 13; 68 L. J. Ch. 419; 80 L. T. 569; 15 T. L. R. 354; *Forster, Ltd.* v. *Suggett*, 35 T. L. R. 87; and as to the protection of business connection, see *Eastes* v. *Russ*, [1914] 1 Ch. 468; 83 L. J. Ch. 329; 110 L. T. 296; 30 T. L. R. 237. In the latter case it was said that an employer is not entitled to a covenant which will eliminate his former employee from the list of possible competitors for all time and over the whole area of his business, but only to a covenant so limited in time and place as to deprive the employee of any benefit which might accrue to him in the way of connection or personal knowledge of the customers.

able in reference to their respective interests, but notwithstanding this the restraint may still be held to be injurious to the public and therefore void (*g*).

The validity of a contract in restraint of trade is for the Court. "Evidence cannot be given on the question of validity or of reasonableness, although evidence can be given as to the nature of the business and of the employment, and, I think, also as to any practice which is usual among business men as regards the terms of the employment . . . because what is usual is to some extent a guide in the consideration of the requirements of the particular business" (*h*).

The onus of establishing that the restraint is reasonable rests upon the person who alleges that it is of that character, and the onus of showing that, notwithstanding that it is of that character, it is nevertheless injurious to the public, and therefore void, rests in like manner upon the party alleging the latter (*i*).

Although there must be some consideration to support a contract in restraint of trade, even though it is under seal, yet the consideration need not be expressly stated in the instrument (*k*). Nor will the Court consider in any particular case the adequacy of the consideration; it is enough if there is "a legal consideration and of some value" (*l*).

Where a covenant is severable part may be good, though part is void. But this is possible only when the several parts are independent of each other, so that the severance merely limits the sphere of operation of the contract; it is not possible where severance would alter the original meaning and effect of the agreement (*m*).

Thus, in the case of *Attwood* v. *Lamont*, a person employed in the tailoring department of a business with several departments

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(*g*) [1916] 1 A. C., at p. 700.

(*h*) *Per* Viscount Haldane, L.C., [1913] A. C., at p. 732; approving *Leng & Co.* v. *Andrews*, [1909] 1 Ch., at p. 770; 78 L. J. Ch. 80.

(*i*) [1916] 1 A. C., at pp. 700, 708.

(*k*) *Gravely* v. *Barnard*, L. R. 18 Eq., at p. 522; 43 L. J. Ch. 659; *Collins* v. *Locke*, 4 A. C., at p. 686; 48 L. J. P. C. 68.

(*l*) *Hitchcock* v. *Coker*, 6 A. & E., at p. 457; 6 L. J. Ex. 266; [1894] A. C., at p. 565; [1916] 1 A. C., at p. 707.

(*m*) [1894] A. C., at p. 561; [1913] A. C., at p. 745. The Courts will not make a new contract for the parties (*British Concrete Co.* v. *Schelff*, [1921] 2 Ch., at p. 577; 91 L. J. Ch. 114; 126 L. T. 230).

covenanted that he would not at any time within a radius of ten miles be employed either in tailoring *or in the business of any of the other departments* in which he took no part. It was held that the covenant relating to tailoring could not be severed from the other covenants, because the object of the agreement was simply to prevent competition; to effect this, a restraint as to every branch of the business was necessary, and to strike out references to all but the tailoring business would alter the scope and intention of the agreement (*n*).

A covenant to retire from business "so far as the law allows" has been held too vague for the Court to enforce (*o*).

Since it is only some lawful interest of the covenantee that may be protected by a contract in restraint of trade, such a contract cannot be enforced against a former assistant by an unregistered medical practitioner who is practising in a manner which is made illegal by statute (*p*).

An agreement by a combination of employers regulating the method by which business is to be carried on by its members may be void as being an unreasonable restraint of trade.

Thus, in the case of *Hilton* v. *Eckersley* (*q*), a contract was made between eighteen mill owners by which they agreed to carry on their works, in regard to the amount of wages, the times of the engagement of workpeople, the hours of work, the suspending of work, and the general discipline and management of the works for twelve months in accordance with the resolutions of the majority of the members of the association. It was held that this contract was void as unduly restricting each member's power of carrying on business according to his own discretion. So also in a recent case where a combination of manufacturers was formed for the purpose of controlling prices and the agreement

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(*n*) [1920] 3 K. B. 571. It was also held that, even if the other restraints were struck out, the restraint in respect of the tailoring business was too wide. For earlier examples of severance, which, however, now require reconsideration ([1920] 3 K. B., at p. 591), see *Mallan* v. *May*, 11 M. & W. 653; 12 L. J. Ex. 376; 63 R. R. 708; *Baines* v. *Geary*, 35 Ch. D. 154; 56 L. J. Ch. 935; *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478; 65 L. J. Q. B. 397. For a recent discussion of the principles on which severance is possible, see *British Concrete Co.* v. *Schelff* (*ubi supra*).

(*o*) *Davies* v. *Davies*, 36 Ch. D. 359; 57 L. J. Ch. 962; 58 L. T. 209.

(*p*) *Davies* v. *Makuna*, 29 Ch. D. 596; 54 L. J. Ch. 1148; 53 L. T. 314.

(*q*) 6 E. & B. 47.

between them, which was unlimited in time, restricted the output of each member and provided that the members should sell only to certain firms and only upon the terms and prices which should be fixed by the association, it was held that the restraint so imposed was unreasonable as between the parties and that the agreement was invalid (*r*).

But, in accordance with the principles already stated, an agreement between several firms to divide between themselves the stevedoring business of a port was held not invalid, although it imposed a restraint upon the members of the association, such restraint being in the particular case partial and reasonable (*s*).

Combinations of workmen for the purpose of raising wages or determining the hours of labour or otherwise interfering with the free course of trade are at Common Law governed by the same rules (*t*).

Combinations by *Trade Unions* are now governed by the Trade Union Acts. By the *Trade Union Act*, 1876, the term "trade union" means any combination for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business.

By s. 3 of the *Trade Union Act*, 1871, the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. But, by s. 4, nothing in the Act is to enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any agreement between members of a trade union as such, concerning

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(*r*) *Evans & Co.* v. *Heathcote*, [1918] 1 K. B. 418; 87 L. J. K. B. 593; 118 L. T. 556; 35 T. L. R. 247.

(*s*) *Collins* v. *Locke*, 4 A. C. 674; 48 L. J. P. C. 68; 41 L. T. 292.

(*t*) According to some authorities combinations, whether of employers or workmen, were illegal at Common Law as conspiracies. They were, at any rate, made illegal by various statutes. An Act of 1825 (6 Geo. 4, c. 129), however, repealed all earlier statutes, and with certain exceptions left such combinations to be dealt with by the Common Law. See the judgment of Erle, J., in *Hilton* v. *Eckersley* (6 E. & B. 47), and of Crompton, J., in *Walsby* v. *Anley*, 3 E. & E. 516; 30 L. J. M. C. 121; 122 R. R. 823. By s. 2 of the Trade Union Act, 1871, the purposes of any *trade union* (as defined in the text) shall not, by reason merely that they are in restraint of trade, be deeemd to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.

the conditions on which any members of such trade union shall sell their goods, transact business, employ, or be employed (*u*).

A contract which is not in restraint of "trade" in the literal sense may be against public policy and void if it unduly fetters a man's liberty of action and power to deal with his property. Thus, in a recent case, a contract between a money-lender and a borrower was held void which bound the latter never, without the consent of the money-lender, to change his residence, or his employment, or to part with any part of his property, or to borrow any money or obtain credit, or incur any liability (*x*).

B. **Agreements Unlawful by Statute.—**

The effect of a statute is a matter of construction, depending upon its language and purpose.

A statute may have the following effects:

1. It may make a contract *unenforceable*, as in cases within s. 4 of the Statute of Frauds, or s. 40 of the Law of Property Act, 1925 (*y*), or s. 4 of the Sale of Goods Act (*z*), or s. 4 of the Trade Union Act (*a*). In such cases the contract, though not enforceable by action, may be valid for other purposes.
2. It may make a contract *void*, as in the case of contracts within Leeman's Act, or the Gaming Acts, 1845 and 1892 (*b*).
3. It may make a contract *illegal*, as in cases within the Sunday Observance Act, 1677, or s. 1 of the Life Assurance Act, 1874, or s. 4 of the Marine Insurance Act, 1906, and s. 1 of the Marine Insurance Act, 1909 (*c*).

(*u*) See *Evans & Co.* v. *Heathcote* (*ubi supra*). But since such an agreement is neither void nor voidable, but only unenforceable by action, a debt created under it can be a good consideration for a promise to pay implied from a subsequent account stated (*id.*, and see *ante*, p. 48). Many other agreements are also made unenforceable by s. 4 of the Act of 1871, as to which see *Rigby* v. *Connol*, 14 Ch. D. 482; 49 L. J. Ch. 328; 42 L. T. 139; *Duke* v. *Littleboy*, 49 L. J. Ch. 802; 43 L. T. 216; *Amalgamated Society of Carpenters, etc.* v. *Braithwaite*, [1922] 2 A. C. 440; 91 L. J. Ch. 688; 38 T. L. R. 879.

(*x*) *Horwood* v. *Millar's Trading Co.*, [1917] 1 K. B. 305; 86 L. J. K. B. 190; 115 L. T. 805; 33 T. L. R. 86.

(*y*) *Ante*, p. 68.

(*z*) *Post*, Part II., Chapter IV.

(*a*) *Ante*, p. 113.

(*b*) *Post*, p. 122.

(*c*) *Post*, Part II., Chapter II.

Contracts illegal by Statute.—Any contract which is expressly or impliedly prohibited by statute is illegal and void (*d*). An example of express prohibition occurs in the *Sunday Observance Act*, 1677 (*e*). A contract made on Sunday is not void at Common Law (*f*), but the Act provides that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted)," and that every person being of the age of fourteen years or upwards so doing shall for every such offence forfeit the sum of five shillings (*g*).

This statute is still in force, and contracts contrary to its provisions are illegal and void; and it has been decided that if a person buys goods of a tradesman on a Sunday the mere fact that he keeps them after that day will not render him liable for the price (*h*). Although the statute uses the words "or other person whatsoever," these general words are limited by the particular words preceding them and include only persons within the classes specified by these words (*i*). Moreover, even in case of such persons, the Act only applies to transactions within "their ordinary calling" (*k*); it does not therefore apply to a sale of a horse on Sunday by a person who is not a dealer in horses (*l*).

Another instance of a contract illegal and void by statute (*m*) is a contract involving simony; that is to say, the buying and selling of Holy orders or of an ecclesiastical benefice.

It will be noticed that the Sunday Observance Act both pro-

(*d*) *Cope* v. *Rowlands*, 2 M. & W., at p. 157; 6 L. J. Ex. 63; 46 R. R. 532.

(*e*) 29 Car. 2, c. 7, s. 1 (the Lord's Day Act).

(*f*) *Drury* v. *Defontaine*, 1 Taunt. 131.

(*g*) It has, however, been decided that only one penalty can be imposed in respect of several acts of trading on one Sunday, as all such acts constitute only one offence (*Crepps* v. *Durden*, Cowp. 640).

(*h*) *Simpson* v. *Nicholls*, 3 M. & W. 240; 7 L. J. Ex. 117; 49 R. R. 586 (decided on demurrer). But if he subsequently makes an express promise to pay he becomes liable (*Williams* v. *Paul*, 6 Bing. 653; 8 L. J. C. P. 280; 31 R. R. 512).

(*i*) Not the driver of a stage coach (*Sandiman* v. *Breach*, 7 B. & C. 96; 5 L. J. K. B. 298; 31 R. R. 169), nor a barber (*Palmer* v. *Snow*, [1900] 1 Q. B. 725; 69 L. J. Q. B. 356).

(*k*) *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*l*) *Drury* v. *Defontaine*, 1 Taunt. 131.

(*m*) See Williams' Real Property, Part 3, Chapter 5; and Encyclopædia of English Law, tit. "Simony."

hibits and penalises contracts within its scope. Sometimes, however, a statute imposes a penalty but does not contain any express prohibition. This often occurs in statutes which penalise the carrying on of some business or profession by persons who are not registered or licensed, or the doing of some particular act in a manner contrary to prescribed regulations. In the consideration of such statutes the question is whether the Legislature, by imposing a penalty, meant to *prohibit* contracts made by unqualified persons or not complying with the statutory conditions (*n*). In determining this question the following rules have to be applied (*o*):

A penalty *prima facie* implies a prohibition (*p*).

This implication always arises when, whether or not the statute is for revenue purposes, one of its objects is to protect the public or a particular class of persons, as for example by preventing improper persons from carrying on a business or by requiring that a certain kind of contract shall be accompanied by certain formalities (*q*).

When the penalty is a recurrent penalty, imposed as often as the act is done, the act is prohibited (*r*).

But the implication does not arise when the penalty is imposed *merely* for revenue purposes (*s*), or when it is imposed once for

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(*n*) *Smith* v. *Mawhood*, 14 M. & W., at p. 64; 15 L. J. Ex. 149; 69 R. R. 724; *Learoyd* v. *Bracken*, [1894] 1 Q. B., at p. 117; 63 L. J. Q. B. 96.

(*o*) For a recent discussion of these rules, see *Re Mahmoud and Ispahani*, [1921] 2 K. B. 716; 90 L. J. K. B. 821; 125 L. T. 161; 37 T. L. R. 489.

(*p*) *Cope* v. *Rowlands*, 2 M. & W., at p. 157; 6 L. J. Ex. 63; 46 R. R. 532.

(*q*) *Victorian, &c., Syndicate* v. *Dott*, [1905] 2 Ch., at p. 630; 74 L. J. Ch. 673; 21 T. L. R. 742; 93 L. T. 127 (contract by unregistered money-lender held void); *Bensley* v. *Bignold*, 5 B. & Ald. 335 (a printer held not to be entitled to recover payment for printing a book on which his name was not printed as then required by statute); *Anderson, Ltd.* v. *Daniel*, [1924] 1 K. B. 138; 93 L. J. K. B. 97; 130 L. T. 518; 40 T. L. R. 161 (a vendor of a fertiliser of soil within s. 1 (1) of the Fertilisers and Feeding Stuffs Act, 1906, who failed to give the invoice required by that section held to be precluded from suing for the price, the statute imposing a penalty for failure to give the prescribed invoice and its object being the protection of purchasers); *Re Mahmoud and Ispahani* (*ubi supra*) (a vendor of linseed oil held to be precluded from enforcing the contract because the *purchaser* had not the licence required by the Seeds, Oils and Fats Order, 1919, the object of the order being to protect the public).

(*r*) *Victorian, &c., Syndicate* v. *Dott* (*ubi supra*); but compare *Learoyd* v. *Bracken* (*ubi supra*).

(*s*) *Cope* v. *Rowlands* (*ubi supra*).

all for failure to carry on a business in accordance with statutory obligations (*t*).

Where a contract is illegal the Court must, as a general rule, refuse to enforce it, even though the objection that it is void comes from the person guilty of the illegality (*u*). Where, however, a contract is not *ab initio* illegal and may be performed either in a lawful or an unlawful way and the defendant, without the knowledge of the plaintiff, has elected to perform it unlawfully, he cannot plead its illegality (*x*). But where for the protection of the public a statute regulates the performance of a contract and imposes a penalty for breach of its regulations, a contract performed in a mode which violates these regulations cannot be enforced by the party guilty of such illegal performance, and it is immaterial that the contract was not *ab initio* illegal and might have been performed by him in a legal manner (*y*).

It may be shown by extraneous evidence that a contract, on the face of it perfectly legal, is void because made with intent to violate the law. Where a contract is to do a thing which cannot be performed without violation of the law it is void, whether the parties knew the law or not. But in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to prove that intention, and in such a case the parties' knowledge of the law is of great importance (*z*).

The legality of a contract is determined by the law which governs it (*a*). Accordingly a contract which is valid by the law of the country where it is made may usually be enforced in this country, although it is void by English law (*b*), unless it conflicts

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(*t*) *Smith* v. *Mawhood* (*ubi supra*) (contract by a tobacco dealer not avoided merely because his name was not painted over his premises as required by statute, the penalty being imposed once for all for carrying on business without having his name so painted, and not being imposed for each contract made).

(*u*) *Re Mahmoud and Ispahani*, [1921] 2 K. B., at p. 72; 90 L. J. K. B. 821.

(*x*) *Ibid.* (*y*) *Anderson* v. *Daniel* (*ubi supra*).

(*z*) *Waugh* v. *Morris*, L. R. 8 Q. B., at pp. 207, 208; 42 L. J. Q. B. 57. As to evidence to show the illegality of a contract under seal, see also *Collins* v. *Blantern*, *ante*, p. 27.

(*a*) *Ante*, p. 51.

(*b*) *Santos* v. *Illidge*, 8 C. B. (N.S.) 861; 29 L. J. C. P. 348; 125 R. R. 919; *Saxby* v. *Fulton*, [1909] 2 K. B. 208; 78 L. J. K. B. 781. (Money lent in a foreign country for the purpose of gaming, the gaming being lawful in that country, is recoverable in England.)

with what are deemed in England to be essential public or moral interests (*c*). But a contract, though valid in the country where it is made, will not be enforced in this country if it is an agreement for the performance in England of something which would violate English law (*d*). And when the rights of the parties to a security for a debt are to be ascertained by the law of England, the security cannot be enforced in England if it is void by English law (*e*).

Effect of Illegality upon collateral agreements.—A contract which is in itself legal, *e.g.*, a contract for the sale of goods, may be void if it is made for the furtherance of an illegal or immoral transaction. Accordingly "any person who contributes to the performance of an illegal or immoral act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing supplied" (*f*). So also money lent for an illegal purpose cannot be recovered (*g*). So also the lessor of premises cannot recover the rent when he knows that the lessee is the mistress of a man by whom he assumes that the rent will be paid (*h*). Similarly an agent has no rights against his principal where he is employed to carry out

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(*c*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591; 73 L. J. K. B. 320; 90 L. T. 608. (A contract valid by the law of the country where made will not be enforced in this country if it was procured by duress.)

(*d*) *Grell* v. *Levy*, 16 C. B. (N.S.) 73; 139 R. R. 414. (An agreement was made by an English attorney in France, and with a French subject, that the former should sue in England for a debt due to the latter, and should receive half the amount recovered. It was held that the agreement, though not unlawful in France, could not be enforced in England, because it entailed the performance in England, by an officer of an English Court, of a contract void by English law on the ground of champerty.

(*e*) *Moulis* v. *Owen*, [1907] 1 K. B. 746; 76 L. J. K. B. 396; 96 L. T. 596; 23 T. L. R. 348. The defendant gave the plaintiff in Algiers a cheque to secure money lent by him to the defendant for gaming, the gaming being legal in Algiers and the consideration for the cheque being valid by French law. The cheque was an English cheque, drawn on an English bank and payable in England. *Held*, that the rights of the parties in the cheque must be governed by English law; that the cheque must therefore be deemed to have been given for an illegal consideration within s. 1 of the Gaming Act, 1835; and that the plaintiff could not recover upon it in this country.

(*f*) *Pearce* v. *Brooks*, L. R. 1 Ex., at p. 217; 35 L. J. Ex. 134 (goods supplied for the purposes of prostitution). See also *Re Mahmoud and Ispahani*, [1921] 2 K. B., at p. 725; 90 L. J. K. B. 821.

(*g*) *McKinnell* v. *Robinson*, 3 M. & W. 434; 7 L. J. Ex. 149; 49 R. R. 672.

(*h*) *Upfill* v. *Wright*, [1911] 1 K. B. 506; 80 L. J. K. B. 254; 103 L. T. 834; 27 T. L. R. 160.

an illegal transaction (*i*). And any subsequent contract made for the purpose of carrying into effect an illegal agreement is also void. Thus a security under seal for the payment of money due under an unlawful agreement is void (*k*).

But, if a transaction is merely *void* and not illegal, collateral agreements are not invalid. Accordingly a contract to pay money due under a void agreement is valid if made under seal (*l*); and if an agent is employed to make void contracts he is entitled to be indemnified by his principal against liabilities incurred by him in the course of his employment. Thus, before the Gaming Act, 1892, a commission agent was employed to make bets and, after the bets had been made and lost, his principal revoked his authority to pay them. The agent was a member of Tattersall's and, according to the usage of Tattersall's, had made the bets in his own name, and, if he had not paid, would have been excluded from Tattersall's as a defaulter, the consequences of which would have been very serious to him. Accordingly he paid the bets and sued his principal for the amount. It was held that, since wagers were not illegal but merely void, the contract of agency was not invalid and that the principal could not revoke the authority given to the agent after the latter had incurred liabilities, but must indemnify him against all payments made in the ordinary course of business (*m*). So also a person who borrows money for a contract which is merely made void by statute may be sued by the lender, even though the latter knows the purpose for which it is borrowed (*n*).

(*i*) *Josephs* v. *Pebrer*, 3 B. & C. 639; 3 L. J. K. B. 102. But this does not apply where the transaction is not *necessarily illegal*, but becomes illegal through some default on the part of the principal (*Haines* v. *Busk*, 5 Taunt. 520).

(*k*) *Fisher* v. *Bridges*, 3 E. & B. 642; 23 L. J. Q. B. 276; 97 R. R. 701. As to negotiable securities, see *post*, Part II., Chapter V.

(*l*) *Payne* v. *Mayor of Brecon*, 3 H. & N. 579; 27 L. J. Ex. 495; 117 R. R. 863; compare *Beaumont* v. *Reeve* (*ante*, p. 104). Past cohabitation is not illegal consideration, but is no consideration for a subsequent promise to pay money. But such a promise is valid if made under seal, because it then requires no consideration. But if an agreement were made to pay money in consideration of future illicit cohabitation, and after cohabitation, the money being unpaid, a bond were given to secure that money, the bond, being given in furtherance of an illegal agreement, would be void (3 E. & B., at p. 650).

(*m*) *Read* v. *Anderson*, 10 Q. B. D. 100; 13 Q. B. D. 779; 53 L. J. Q. B. 552; 51 L. T. 55.

(*n*) *Simpson* v. *Bloss*, 7 Taunt., at p. 249; 17 R. R. 509.

When a contract is in itself legal, but one of the parties, without the knowledge of the other, has entered into it for the furtherance of an illegal transaction, the innocent party is not thereby prevented from recovering any money due to him under the contract (*o*). If he discovers the illegal intention of the other party, he may rescind the contract while it is still executory; but if after discovering such illegal intention he executes his part of the contract, he is not entitled to enforce payment (*p*).

A contract may be partly good and partly bad. "Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (*q*). But where there is one entire contract, and any part of the consideration is void, the whole contract is void (*r*).

Money paid under an illegal or immoral agreement cannot be recovered.—"The test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case" (*s*). Accordingly, where money has been paid under an illegal or immoral agreement, the person paying cannot recover if, in order to establish his claim, he has to rely on the illegal agreement originally entered into between himself and the defendant (*t*).

(*o*) See *Pearce* v. *Brooks* (*ubi supra*).

(*p*) *Cowan* v. *Milbourn*, L. R. 2 Ex. 230; 36 L. J. Ex. 124. The lessor of a hall held to be entitled to rescind a contract to let it on discovering that it was to be used for blasphemous lectures. The case is, however, no longer an authority upon the question of what constitutes blasphemy. See *Bowman* v. *Secular Society*, [1917] A. C. 406; 86 L. J. Ch. 568; 117 L. T. 161; 33 T. L. R. 676.

(*q*) *Pickering* v. *Ilfracombe Railway*, L. R. 3 C. P., at p. 250; 37 L. J. C. P. 118; *Putsman* v. *Taylor*, [1927] 1 K. B. 637.

(*r*) *Hopkins* v. *Prescott*, 4 C. B., at pp. 595, 596; 16 L. J. C. P. 259; 72 R. R. 647. See also *Shackell* v. *Rosier*, 2 Bing. N. C. 634; 5 L. J. C. P. 193; 42 R. R. 666.

(*s*) *Farmers' Mart, Ltd.* v. *Milne*, [1915] A. C., at p. 113; 84 L. J. P. C. 33; 111 L. T. 871.

(*t*) *Ibid.*, and see *Ex p. Wolverhampton Banking Co.*, 14 Q. B. D. 32; 1 Morrell, 261 (money paid to stifle a prosecution); *Kearley* v. *Thompson*, 24 Q. B. D. 742; 59 L. J. Q. B. 288; 63 L. T. 150 (money paid under an illegal contract to stifle bankruptcy proceedings); *Parkinson* v. *College of Ambulance, Ltd.* (*ante*, p. 105); *Taylor* v. *Chester*, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225 (immoral transaction). The extent to which this rule is applicable to contracts which are merely immoral is not clear. It has been held not to

The only *exceptions* to the above rule are:—

i. Where the parties are not *in pari delicto* and where public policy is considered as advanced by allowing the more excusable to obtain relief (*u*). In such cases Equity gave relief, not on the ground of illegality, but in spite of it, on the ground of unfair pressure or undue influence (*x*).

ii. Where an agent receives money for his principal he must account for it to his principal, even though it is paid under an illegal contract between his principal and the person who pays the money (*y*).

iii. Where the illegal purpose has not been carried out (*z*). But this exception does not apply if the illegal purpose has been effected. Thus, where a defendant in a criminal case, who was ordered to find bail for his good behaviour for a certain period, deposited money with his surety to secure him, under an arrangement for repayment at the end of the period, it was held

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apply to money paid under a marriage brocage contract, as not being "analogous to a contract in restraint of trade or a contract to stifle a prosecution" (*Hermann* v. *Charlesworth*, [1905] 2 K. B., at p. 136; 74 L. J. K. B. 620; 93 L. T. 284; 21 T. L. R. 368).

(*u*) *Reynell* v. *Sprye*, 1 De G. M. & G., at p. 679; 21 L. J. Ch. 633; 91 R. R. 225; *Atkinson* v. *Denby*, 7 H. & N. 934; 31 L. J. Ex. 362. Thus parties are not *in pari delicto* where an illegal contract of insurance is entered into, the assured being ignorant of the law, and being induced to enter into the contract by a fraudulent misrepresentation of law made by the agent of the assurance company (*Hughes* v. *Liverpool, &c., Friendly Society*, [1916] 2 K. B. 482; 85 L. J. K. B. 1643; 115 L. T. 40; 32 T. L. R. 525). Where, however, on a similar case, the misrepresentation of law was made innocently by the agent, it was held that, since there was a common mistake of law, the parties were *in pari delicto* and that the assured could not therefore recover premiums paid by him (*Harse* v. *Pearl Life Assurance*, [1904] 1 K. B. 558; 73 L. J. K. B. 373; 90 L. T. 245; 20 T. L. R.).

(*x*) *Jones* v. *Merionethshire, &c., Building Society*, [1892] 1 Ch., at p. 182; 61 L. J. Ch. 138; 65 L. T. 685. See also *Smith* v. *Cuff*, 6 M. & S. 160; 18 R. R. 340.

(*y*) *Tennant* v. *Elliott*, 1 B. & P. 3; 4 R. R. 755; *Farmer* v. *Russell*, 1 B. & P. 296; see also *Nicholson* v. *Gooch*, 5 E. & B., at p. 1016; 25 L. J. Q. B. 137; 103 R. R. 842. *A fortiori*, if the contract is only void (*Beeston* v. *Beeston*, 1 Ex. D. 13; 45 L. J. Ex. 230). But the exception does not apply where the transaction between the principal and the agent is illegal (*McGregor* v. *Lowe*, 1 C. & P. 200; see also *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; 65 L. J. Ch. 238).

(*z*) *Taylor* v. *Bowers*, 1 Q. B. D. 291; 46 L. J. Q. B. 39; 34 L. T. 938; *Herman* v. *Jeuchner*, 15 Q. B. D. 561; 54 L. J. Q. B. 340; 53 L. T. 94; *Kearley* v. *Thompson* (*ubi supra*); *Hermann* v. *Charlesworth* (*ubi supra*).

that no action could be maintained by the depositor to recover it back, either before or after the period, although the defendant had not committed any default and the surety had not been called upon to make any payment, for the contract was illegal because it took away the protection which the law affords for securing the good behaviour of a defendant, and the illegal purpose was completed as soon as the surety lost any interest in taking care that the conditions of the recognisance were performed (*a*). Where, under an illegal contract, two parties deposit money with a stakeholder to abide a certain event, if the event happens and the money is paid over by the stakeholder to the winner, the loser cannot recover his stake. But before the event has happened, either party may reclaim his stake. And, even if the event has happened, the loser may reclaim his stake from the stakeholder at any time before it has been paid to the winner (*b*).

iv. Where the contract is made illegal by a statute intended to protect a certain class of persons, and the person seeking to recover is a member of the protected class (*c*).

Gaming and Wagering Contracts.

All gaming and wagering contracts are now void by the Gaming Act, 1845. Gaming is playing at any game, whether of chance or skill, for money or money's worth, which is staked on the result of the game (*d*). A wager is an agreement between two parties that upon the determination of a future uncertain event one party shall win from the other a sum of money or other

(*a*) *Herman* v. *Jeuchner* (*ubi supra*).

(*b*) *Hastelow* v. *Jackson*, 8 B. & C. 221; 6 L. J. K. B. 318; 32 R. R. 369; *Hermann* v. *Charlesworth* (*ubi supra*); *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L. J. Ch. 636; 68 L. T. 709.

(*c*) *Kearley* v. *Thompson*, 24 Q. B. D., at p. 746; *Bonnard* v. *Dott*, [1906] 1 Ch. 740; 75 L. J. Ch. 446; 94 L. T. 656; 22 T. L. R. 399; *Barclay* v. *Pearson*, [1893] 2 Ch. 154 (*post*, p. 129).

(*d*) *R.* v. *Ashton*, 1 E. & B. 286; 22 L. J. M. C. 1; 93 R. R. 138; *Dyson* v. *Mason*, 22 Q. B. D. 351; 58 L. J. M. C. 55; *Lockwood* v. *Cooper*, [1903] 2 K. B. 428; 72 L. J. K. B. 690.

stake, neither of the contracting parties having any other interest in the contract than the sum or stake he will so win or lose. It is essential to a wagering contract that each party may under it either win or lose; if either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract (*e*).

At Common Law such contracts were not void unless of such a nature as to contravene public policy, as, for instance, if tending to the injury or annoyance of others, or to outrage decency. By various statutes, however, certain forms of betting were made illegal (*f*). The *Gaming Act*, 1845, put an end to all distinctions between legal and illegal wagers (*g*) by providing that all contracts or agreements by way of gaming or wagering shall be null and void, and that no action shall be brought to recover any sum of money or valuable thing alleged to have been won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made; but this is not to be deemed to apply to any subscription, or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise. In addition, the *Gaming Act*, 1892, also now provides that any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845, or to pay any sum of money by way of commission, fee, reward, or *otherwise in respect of any such contract or of any services in relation thereto or in connection therewith*, shall be null and void, and no action shall be brought or maintained to recover any such sum of money. These Acts do not make the contracts illegal, but only make them unenforceable in a Court of justice

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(*e*) *Thacker* v. *Hardy*, 4 Q. B. D. 685; 48 L. J. Q. B. 289; *Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B., at p. 490; 62 L. J. Q. B. 257; *Forget* v. *Ostigny*, [1895] A. C., at p. 326; 64 L. J. P. C. 62. See *Richards* v. *Starck*, [1911] 1 K. B., at p. 302; 80 L. J. K. B. 213; 103 L. T. 813; 27 T. L. R. 29. As to when contracts of insurance are wagers, see *post*, Part II., Chapter II.

(*f*) *Hampden* v. *Walsh*, 1 Q. B. D., at p. 192; 45 L. J. Q. B. 238; 33 L. T. 852.

(*g*) *Trimble* v. *Hill*, 5 A. C., at p. 344; 49 L. J. P. C. 49.

if the statute is pleaded (*h*) or if the Judge during the trial discovers the claim to fall within the statute (*i*).

The first of these Acts dealt merely with wagering contracts themselves and, since it merely made them void and not illegal, did not avoid collateral transactions. Therefore money paid in discharge of the betting debts of another person was recoverable (*k*), and, as between principal and agent, the agent did not lose his rights against his principal because he was employed for the purpose of betting (*l*). If, however, a principal employed an agent to make bets which the agent failed to make, the principal could not maintain against him an action for damages for breach of contract, because the agent was employed to enter into contracts which, if made, would have been void and the performance of which could not have been enforced (*m*).

But the Gaming Act, 1892, also makes void collateral contracts. Thus, if A, at the request of B, pays B's betting debts, he cannot recover the amount from B, since the payments were made "in respect of" a contract void under the Gaming Act, 1845 (*n*). And, on this principle, where one person advanced money to another as his partner for the purpose of making bets on their joint account and the money was lost, it was held that the person who had advanced the money could not maintain an action against the other for half the amount so lost (*o*). But if an agent is employed to make bets, which are won and received by the agent, the Act does not prevent the principal from recovering the same from the agent as money received on his behalf (*p*). Nor does the Act of 1892 prevent the recovery of

(*h*) Order XIX., rule 15; and as to proceedings in a County Court, see County Court Rules, Order X., rule 18.

(*i*) *Scott* v. *Brown*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; *Montefiore* v. *Menday Motor Components Co.*, [1918] 2 K. B. 241; 87 L. J. K. B. 907; 114 L. T. 340; 34 T. L. R. 463.

(*k*) *Rosewarne* v. *Billings*, 15 C. B. (N.S.) 316; 137 R. R. 528.

(*l*) *Read* v. *Anderson* (*ante*, p. 119).

(*m*) *Cohen* v. *Kittell*, 22 Q. B. D. 680; 50 L. J. Q. B. 241; 60 L. T. 932. Affirmed in *Cheshire & Co.* v. *Vaughan Brothers & Co.*, [1920] 3 K. B. 240; 89 L. J. K. B. 1168; 123 L. T. 489.

(*n*) *Tatam* v. *Reeve*, [1893] 1 Q. B. 779; 62 L. J. Q. B. 30; 67 L. T. 683. This applies whether or not A was employed to make the bets, and apparently whether or not A knew that the debts were for bets.

(*o*) *Saffery* v. *Mayer*, [1901] 1 K. B. 11; 83 L. T. 394; 70 L. J. K. B. 145.

(*p*) *De Mattos* v. *Benjamin*, 63 L. J. Q. B. 248; 70 L. T. 560. See also *Cheshire & Co.* v. *Vaughan Brothers & Co.*, [1920] 3 K. B., at p. 249; 89 L. J. K. B. 1168.

money lent to pay betting losses (*q*). But it does prevent the recovery of money lent for the purposes of a wager *and repayable only in the event of the borrower winning the wager.* Thus in one case the defendant, who had agreed to contest a boxing match with another person, for stakes to be deposited with a stakeholder by himself and the other combatant, requested the plaintiff to help him by advancing the money for his stake. This the plaintiff did by paying the amount to the stakeholder, and the arrangement was that the money was to be repaid to the plaintiff if the defendant won the match, but not if he lost it. The defendant won the match and received the whole stakes, and then refused to repay the plaintiff. It was held that the money was paid by the plaintiff in respect of a contract rendered null and void by the Gaming Act, 1892, and that the action could not be maintained (*r*). It has not yet been decided whether money lent in England for the purpose of making bets in England, but repayable at all events, can be recovered by the lender (*s*). But money lent in a country where gaming or betting is recognised by law, for the purpose of gaming or betting there, can be recovered in England (*t*).

The *Betting Act*, 1853 (*u*), provides that it shall be illegal to keep any " place " for the purpose of betting, and therefore any contract in contravention of the Act would be *illegal.* But the business of a bookmaker is not illegal if it is carried on in a manner which does not infringe the provisions of the statute (*x*), and an action can accordingly be maintained by one partner in a bookmaker's business against the other partner for an account of the

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(*q*) *Re O'Shea, Ex p. Lancaster*, [1911] 2 K. B. 981; 81 L. J. K. B. 70; 105 L. T. 486.

(*r*) *Carney* v. *Plimmer*, [1897] 1 Q. B. 634; 66 L. J. Q. B. 415.

(*s*) It is submitted, however, that it can be recovered unless lent for *illegal* gaming (*McKinnell* v. *Robinson*, *ante*, p. 118), or under a contract between lender and borrower that it is to be applied for making bets.

(*t*) *Saxby* v. *Fulton*, [1909] 2 K. B. 208; 78 L. J. K. B. 781; 101 L. T. 179, following *Quarrier* v. *Colston*, 1 Phillips, 147; 65 R. R. 351; *Société, etc., du Paris Plage* v. *Baumgart*, [1927] W. N. 78.

(*u*) 16 & 17 Vict. c. 119, s. 3. As to what is a " place " within the meaning of this Act, see *Powell* v. *Kempton Park Racecourse Co.*, [1899] A. C. 143; 68 L. J. Q. B. 392; 80 L. T. 538; *R.* v. *Stoddart*, [1901] 1 Q. B. 177; 70 L. J. Q. B. 189; 83 L. T. 538.

(*x*) *Jeffrey* v. *Bamford*, [1921] 2 K. B. 351; 90 L. J. K. B. 664; 125 L. T. 348; 37 T. L. R. 601.

profits of the partnership (*y*), and the plaintiff will be entitled to recover any balance of his capital which has not been applied in payment of bets (*z*); but in taking the account the Court may refuse to deal with any items relating to profits earned by illegal practices (*a*), and the plaintiff will not be entitled to claim contribution in respect of any losses paid by him (*b*).

Stock Exchange transactions.—Where a speculator employs a broker on the Stock Exchange to effect contracts for the sale or purchase of stock according to the rules of the Stock Exchange for delivery on a future day, the contract between them is not illegal or void merely because it is the intention of both parties that the speculator shall not be called upon actually to deliver or accept such stock as may be sold or purchased, but only to pay or receive, as the case may be, the difference between the price of the stock on the day of the sale and the price on the day named for delivery (*c*). If, however, the broker is not employed to make contracts for the sale or purchase of stocks, but the agreement between him and the speculator is that the latter shall merely pay or receive differences, this, though not illegal, is a void agreement (*d*), even although there is superadded to the contract a provision that, if required, the stock shall be actually delivered, or actually taken up (*e*). It is for the jury to say

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(*y*) *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; 65 L. J. Ch. 238; 74 L. T. 164. The case of *Thomas* v. *Dey*, 24 T. L. R. 272, is not law (*Keen* v. *Price*, *infra*).

(*z*) *Keen* v. *Price*, [1914] 2 Ch. 98; 83 L. J. Ch. 865; 111 L. T. 204; 30 T. L. R. 490.

(*a*) *Keen* v. *Price* (*ubi supra*). It is submitted, however, that the plaintiff can recover his share of profits not so earned. See *De Mattos* v. *Benjamin* (*ante*, p. 124, n. (*p*)) and *Brookman* v. *Mather*, 29 L. T. 276, where, in the absence of any evidence that the partnership business was carried on in a manner illegal within the Betting Act, 1853, it was held that the plaintiff could recover on an I.O.U. given him by the defendant for an amount agreed to be due to him on the taking of an account at the dissolution of a betting partnership between them. See, however, *contra*, *Keen* v. *Price* (*ubi supra*).

(*b*) *Saffery* v. *Mayer* (*ante*, p. 126, n. (*o*)).

(*c*) *Thacker* v. *Hardy*, *Thacker* v. *Wheatley* (1879), 4 Q. B. D. 685; 48 L. J. Q. B. 289; *Ex p. Rogers*, *re Rogers* (1880), 15 Ch. D. 207; 29 W. R. 29; 43 L. T. 163; *Forget* v. *Ostigny*, [1895] A. C. 318; 64 L. J. P. C. 62; 72 L. T. 399.

(*d*) *Per* Bramwell, L.J., in *Thacker* v. *Hardy* (1879), 48 L. J. Q. B., at p. 296.

(*e*) *Re Gieve*, *ex p. Trustee*, [1899] 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L. T. 438.

whether a contract relating to dealings in stocks and shares is intended by the parties to be a gambling transaction in differences or a *bona fide* sale and purchase of shares, and the Court will not ordinarily interfere with the finding of the jury (*f*). The point to be considered is whether, as between broker and speculator, it is a wager in differences or whether the broker, although he may know that the speculator is merely gambling, is employed as broker for the purpose of making, on behalf of the speculator, real contracts in which his gain consists only in the commission which he is to receive (*g*). If the transaction is held to be a contract by way of gaming and wagering, it has been decided that securities deposited by the client with the stockbroker by way of "cover" can be recovered back by the client (*h*). If, however, money is deposited in a similar way, and is actually appropriated in payment of losses, it cannot be recovered back (*i*), though, where there are no losses or the losses have not exhausted the deposit, it is otherwise (*k*).

Deposits with a stakeholder.—If on a gaming contract a deposit is made with a person as stakeholder, here, before such deposit is actually paid over to the winner, the person so depositing it has a right to demand and recover it back again, for he has to this extent a *locus pœnitentiæ* (*l*); and this is still the law, notwithstanding the Gaming Act, 1892 (*m*). Both this point and also what will be held to be a gaming and wagering contract are well shown by *Hampden* v. *Walsh* (*n*), in which

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(*f*) *Universal Stock Exchange* v. *Strachan* (*No.* 1), [1896] A. C. 166; 65 L. J. Q. B. 429; 74 L. T. 468.

(*g*) See cases in note (*c*) above. See also *Barnett* v. *Sanker*, 41 T. L .R. 660.

(*h*) *Universal Stock Exchange* v. *Strachan* (*ubi supra*). The securities are not deposited "to abide the event," but as security against a debt which may arise.

(*i*) *Strachan* v. *Universal Stock Exchange* (*No.* 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178; 73 L. T. 492.

(*k*) *Re Cronmire, ex p. Waud*, [1898] 2 Q. B. 383; 67 L. J. Q. B. 629.

(*l*) *Varney* v. *Hickman*, 17 L. J. C. P. 102; *Martin* v. *Hewson*, 24 L. J. Ex. 174; *Diggle* v. *Higgs*, 2 Ex. D. 422; 46 L. J. Ex. 721. See also *ante*, p. 122.

(*m*) *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; 64 L. J. Q. B. 308; 72 L. T. 285; *Burge* v. *Ashley & Smith, Ltd.*, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518.

(*n*) 1 Q. B. D. 189; 45 L. J. Q. B. 438. See also *Diggle* v. *Higgs*, 2 Ex. D. 422; 46 L. J. Ex. 721, and *Trimble* v. *Hill*, 5 A. C. 342; 49 L. J. P. C. 49, to the same effect.

the facts were as follows:—The plaintiff and one Wallace each deposited £500 in the defendant's hands as stakeholder, upon an agreement that if Wallace proved the convexity or curvature to and fro of any canal, river, or lake by actual measurement and demonstration, to the satisfaction of certain referees, he should receive both sums, but that if he failed, then the plaintiff should receive both. The experiment was made, and decided by the referees in favour of Wallace, and the defendant paid the whole £1,000 over to him accordingly. Before, however, he had done so the plaintiff objected to the decision, and he afterwards brought this action to recover his own £500 deposit as money had and received by the defendant to his use, and it was held: (1) That the agreement was a wager, and so null and void within the Gaming Act, 1845; and (2) that the plaintiff was entitled to recover on the ground that that statute does not apply to an action by a person to recover his own deposit, and he had here revoked the authority of the stakeholder before he had paid over the money. If, however, a stakeholder pays the money over to the winner with the express or implied assent of the loser, then he is discharged from any further liability (*o*).

No action will lie by the winner against a stakeholder for the whole of the amount in his hands (*p*). In a recent case, however, the trustee in bankruptcy of the winner of one of two depositors with a stakeholder was allowed to recover the whole amount from the stakeholder, neither he nor the other depositor raising any claim, and the stakeholder having interpleaded (*q*).

It will be noticed that the Gaming Act, 1845, contains a proviso that the enactment shall not extend to any subscription or contribution, or agreement for the same, towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, pastime, or exercise. It has, however, been held that an agreement between two persons to deposit money in the hands of a third, to abide the event of a lawful game between the two, is void within the statute, and is not a subscription or contribution for a sum of money to be awarded to the winner within the proviso; but although the winner of the

(*o*) *Howson* v. *Hancock*, 8 T. R. 575.
(*p*) *Hampden* v. *Walsh*, 1 Q. B. D., at p. 192; 45 L. J. Q. B. 238.
(*q*) *Shoolbred* v. *Roberts*, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 3 L. T. 37.

match cannot sue the loser or stakeholder to recover the stakes, yet he may repudiate the transaction, and bring an action to recover back the amount deposited by him with the stakeholder (*r*).

Lotteries are rendered illegal by the provisions of the Lottery Acts (*s*). But a lottery constituted avowedly for the benefit of its members, making certain of them entitled to particular benefits by the process of periodical drawings, does not come within the scope of these enactments (*t*). And a competition the result of which depends to any extent upon the skill or judgment of the competitors, and not *entirely* upon chance, is not a lottery (*u*).

Leeman's Act.—By this Act (*x*) all contracts for the sale and purchase of shares and stock in joint-stock banking companies are void if they do not specify the distinguishing numbers of such shares or stock or, if there are no distinguishing numbers, the name of every registered proprietor. A custom exists on the Stock Exchange to disregard this Act, and there is, in fact, a rule on the Stock Exchange that if a member shelters himself behind its provisions he shall be liable to expulsion. If a client of a stockbroker, knowing of this custom, has permitted the stockbroker to enter into a contract in breach of this Act, he is bound to indemnify the stockbroker, so that any loss may be recovered from him by the stockbroker, notwithstanding the provisions of the Act, on the principle that he has knowingly caused the stockbroker to incur a practical, though not a legal, liability, and is therefore bound to indemnify him therefrom (*y*). But if the client did not know of the custom existing on the Stock Exchange to disregard Leeman's Act, then it is otherwise, the custom

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(*r*) *Diggle* v. *Higgs*, 2 Ex. D. 422; 46 L. J. Ex. 721.

(*s*) 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119. See *Allport* v. *Nutt*, 1 C. B. 974; 14 L. J. C. P. 272; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; 62 L. J. Ch. 636; 68 L. T. 709. But a competitor in a lottery can recover his contribution before it is paid over to the winner on the grounds (i) that he belongs to a class protected by statute (*ante*, p. 122), and (ii) that the person with whom the fund is deposited is merely a stakeholder, from whom recovery is possible, even though the contract is illegal (*ante*, p. 129).

(*t*) *Wallingford* v. *Mutual Society*, 5 A. C. 685; 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

(*u*) *Hall* v. *Cox*, [1899] 1 Q. B. 198; 68 L. J. Q. B. 167; 79 L. T. 653; 15 T. L. R. 82.

(*x*) 30 & 31 Vict. c. 29.

(*y*) *Seymour* v. *Bridge*, 14 Q. B. D. 460; 54 L. J. Q. B. 347.

having been held to be unreasonable (*z*), and it being a well-established rule that a person is only bound by an unreasonable custom if at the time of dealing he knew of it, and expressly or impliedly agreed to be bound by it (*a*).

Bonds and negotiable securities for gaming debts.—By 9 Anne, c. 14, all notes, bills, bonds or other securities given for any money won by gaming, or by betting on games, or knowingly lent for gaming or betting thereon, were made *void*. But by the *Gaming Act*, 1835 (*b*), it was provided that all notes, bills and mortgages within the Statute of Anne should be deemed to have been made, drawn, accepted and given for an *illegal* consideration. The effect of the latter Act is that if any such note or bill is transferred to a holder in due course, he will have a right to recover thereon, although the person to whom it was originally given could not have done so (*c*).

It must be borne in mind that the latter Act does not deal with all bills and notes given for wagering debts, but only with such as are given in respect of money won by gaming or betting on games, on which it may be noticed that a horse-race has been held to be a "game" (*d*). Therefore, as regards any instrument given in respect of a wager transaction not of this character, the 1835 Act has no application, *e.g.*, a promissory note given for a bet lost over the result of a contested election. The instrument in such cases is simply given in respect of a void transaction, and therefore, though it cannot be sued upon by the party to whom given, because there is no consideration, yet it can be sued upon by a subsequent holder for value, and this even though he took with notice of what it was given for; nor is it necessary for a subsequent holder to prove in the first instance that he gave value for it, though if it be proved that he gave none he cannot recover (*e*).

(*z*) *Perry* v. *Barnett*, 15 Q. B. D. 388; 54 L. J. Q. B. 466.

(*a*) *Sweeting* v. *Pearce*, 9 C. B. (N.S.) 534; 30 L. J. C. P. 109; *Blackburn* v. *Mason* (1893), 68 L. T. 510.

(*b*) 5 & 6 Will. 4, c. 41, s. 1. S. 2 of the Act is repealed by the Gaming Act, 1922.

(*c*) Bills of Exchange Act, 1882, ss. 29, 30.

(*d*) *Woolf* v. *Hamilton*, [1898] 2 Q. B. 337; 67 L. J. Q. B. 917; 79 L. T. 49.

(*e*) *Fitch* v. *Jones*, 5 E. & B. 245; 23 L. J. Q. B. 293; 103 R. R. 455; *Lilley* v. *Rankin* (1887), 56 L. J. Q. B. 248; 55 L. T. 814.

Subsequent transactions and contracts for valuable consideration.—Since wagers are not illegal, they do not avoid bonds subsequently given to avoid the consequences of not having paid them. Thus when A had lost money in betting on horse-races and was warned by the Jockey Club that unless he satisfied these bets his horses would not be allowed to run on any course subject to the Club's rules, and A gave a bond with sureties for £10,000, it was held that an action would lie on the bond, for it was not given to pay bets but to avoid the consequences of not having paid them (*f*). And any promise to pay a lost wager is enforceable if there is a new contract for valuable consideration. Thus where C had paid £800 in lost bets as agent for D but could not recover from D by reason of the Gaming Act, 1892, and C reported the matter to D's sporting club, so that D was not re-elected at the next annual election of members, and D then accepted bills for £400 in consideration of C withdrawing his complaint, it was held that C could prove, on the bankruptcy of D, for the amount due on the bills (*g*). And an action has been held to be maintainable on a cheque given by the defendant in payment of lost bets, in consideration of not being posted at his club as a defaulter (*h*); so also, where the debtor was not a member of Tattersalls or of any sporting club, it was held that an action would lie on a promise to pay in consideration of not being posted as a defaulter in the list compiled by the Turf Register or at Tattersalls or any of the sporting clubs (*i*). But if the creditor takes a bill and then a renewed bill on dishonour, as the best thing he can get and without any threat to post the debtor as a defaulter, no action lies, as in the absence of any threat by the creditor to do something that he may lawfully do, there is no fresh consideration (*k*).

(*f*) *Bubb* v. *Yelverton*, L. R. 9 Eq. 471; 39 L. J. Ch. 428. No opinion was expressed as to whether the bond would have been good if given for *payment* of the bets. It seems, however, that a bond given for payment of bets would be void if within the Statute of Anne, but not otherwise.

(*g*) *Re Browne, ex p. Martingell*, [1904] 2 K. B. 133; 73 L. J. Ch. 446.

(*h*) *Goodson* v. *Baker*, 98 L. T. 415; 24 T. L. R. 338. See also *Hyams* v. *Stuart King*, [1908] 2 K. B. 696; 77 L. J. K. B. 794; 99 L. T. 424; 24 T. L. R. 675, in which all the earlier cases are reviewed.

(*i*) *Hodgkins* v. *Simpson*, 25 T. L. R. 53; *Cohen & Co.* v. *Ulph & Co.*, 25 T. L. R. 710.

(*k*) *Re Comar, ex p. Ronald*, 52 Sol. Jo. 642.

Stamping.

The mere fact that an instrument which ought to have been stamped has not been stamped within the proper time does not render it illegal, but prevents it (except in criminal proceedings) being given in evidence or being available for any purpose whatever, until stamped; and it is the duty of the officer of the Court to call the attention of the Court to any want or insufficiency of the stamp (*l*). An unstamped instrument may, however, be put in evidence for collateral purposes: thus an unstamped promissory note may be handed to a witness in order to challenge his recollection (*m*). An ordinary agreement not under seal and not charged with any specific duty, is subject to a stamp duty of 6d., which may be denoted by an adhesive stamp or stamps, which must be cancelled by the person first executing the agreement (*n*); a contract under seal and not charged with any specific duty is subject to a duty of 10s., which must be denoted by an impressed stamp (*o*); each must be stamped within fourteen days of execution (*p*), or afterwards can only be stamped on payment of a penalty of £10, and if paid in Court, a further penalty of £1 (*q*). The following agreements, however are exempted from stamp duty:—

i. An agreement or memorandum the matter whereof is not of the value of £5.

ii. An agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant.

iii. An agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise.

iv. An agreement or memorandum made between the master

(*l*) Stamp Act, 1891, s. 14. Counsel never take a stamp objection.

(*m*) *Birchall* v. *Bullough*, [1896] 1 Q. B. 325; 65 L. J. Q. B. 252; 74 L. T. 27.

(*n*) Stamp Act, 1891, s. 22 and First Schedule.

(*o*) *Id.*, ss. 1 and 2 and First Schedule.

(*p*) This right to stamp within fourteen days of execution is only under a regulation of the Commissioners of Inland Revenue, which they have power to alter.

(*q*) Stamp Act, 1891, ss. 14, 15. The Commissioners have, however, power to remit the penalty or any part of it on application (*Id.*, s. 15 (3); Finance Act, 1895, s. 15).

and mariners of any ship or vessel, for wages on any voyage coastwise from port to port in the United Kingdom (*r*).

An I O U or an acknowledgment of a debt does not require stamping unless it contains some special terms of agreement (*s*).

(*r*) Stamp Act, 1891, First Schedule.

(*s*) *Fisher* v. *Leslie*, 1 Esp. 429; *Brooks* v. *Elkins*, 2 M. & W. 74; 6 L. J. Ex. 6; 46 R. R. 405; *Sibree* v. *Tripp*, 15 M. & W. 23; 15 L. J. Ex. 318; 71 R. R. 545.

CHAPTER V.

CONTRACTS WITH PERSONS UNDER INCAPACITY.

Infants.—An infant, in the eyes of the law, is a person under the age of twenty-one years, at which period he or she is said to attain majority (*a*). At Common Law the contracts of an infant were *voidable*, except in the case of contracts for necessaries. By statute, however, some contracts of an infant have been made void, so that infants' contracts are now of three classes: some being *valid*, some being *void*, and the remainder being *voidable*.

Valid contracts.—An infant was, at Common Law, liable for necessaries actually supplied to himself, or to his wife or children (*b*), and so far as concerns the sale of goods this rule has been made statutory by s. 2 of the *Sale of Goods Act*, 1893, which provides that " when necessaries are sold and delivered to an infant . . . he must pay a reasonable price therefor " (*c*).

The Common Law rule as to what goods are necessaries was stated as follows: " The word ' necessaries ' is not confined in its strict sense to such articles as were necessary to the support of life but extended to articles fit to maintain *the particular person* in the state, station and degree of life in which he is. . . . All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for anyone, and for such matters, therefore, an infant cannot be made responsible.

(*a*) An infant attains majority on the last day of the twenty-first year of his age: see *Re Shurey*, [1918] 1 Ch. 263; 87 L. J. Ch. 245; 118 L. T. 355; 34 T. L. R. 171.

(*b*) *Chapple* v. *Cooper*, 13 M. & W., at p. 259; 13 L. J. Ex. 286; 67 R. R. 586; and see *Turner* v. *Trisby*, 1 Str. 168, and *Turbeville* v. *Whitehouse*, 1 C. & P. 94.

(*c*) It must be noted that the statute applies only to goods " sold and delivered," not to executory contracts, and that the infant is not bound to pay the contract price, but only a reasonable price. This also confirms the Common Law principle that the liability of an infant was not strictly contractual, but quasi-contractual, being imposed by law and not by agreement. See *Re Rhodes*, 44 Ch. D. 94; 59 L. J. Ch. 298, and *Nash* v. *Inman*, [1908] 2 K. B., at p. 8; 77 L. J K. B. 626; 98 L. T. 658.

But if they are not strictly of this description, then the question arises whether they are bought for the necessary use of the party in order to maintain himself properly in the degree, state and station of life in which he moved; if they were, for such articles the infant may be responsible " (*d*).

Thus " suppose the son of the richest man in the kingdom to have been supplied with diamonds and racehorses . . . such articles cannot possibly be necessaries " (*e*). So also expensive entertainments (*f*) and presents to friends (*g*) are not necessaries. But " for a young man in some situations of life a watch may be necessary " (*h*), or, possibly, other ornamental articles (*i*). And under special circumstances things which *prima facie* are " merely comforts or conveniences " (*k*) may be necessaries, as, for example, horses to an infant who has been ordered by his medical adviser to take exercise on horseback (*l*), or luxuries that are necessary medicinally (*m*). The onus of establishing the existence of any such exceptional circumstances lies upon the plaintiff (*n*).

But even if things belonged to the class of necessaries, as distinguished from luxuries, the plaintiff was at Common Law also required to show that at the time when they were supplied they were necessaries to the infant (*o*). Accordingly the infant might, for the purpose of showing that they were not necessaries, give evidence that he was already sufficiently supplied with goods of a similar description, and it was immaterial whether the plaintiff did or did not know of the existing supply (*p*). These Common Law rules as to what are necessaries are also rendered statutory by

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(*d*) *Peters* v. *Fleming*, 6 M. & W., at pp. 46, 47; 9 L. J. Ex. 81; 55 R. R. 495.

(*e*) *Wharton* v. *Mackenzie*, 5 Q. B., at p. 612; 13 L. J. Q. B. 130; 64 R. R. 584. Cp. *Hewlings* v. *Graham*, 70 L. J. Ch. 568; 84 L. T. 497 (cartridges are not necessaries).

(*f*) *Wharton* v. *Mackenzie* (*ubi supra*).

(*g*) *Ryder* v. *Wombwell*, L. R. 4 Ex. 32; 38 L. J. Ex. 8.

(*h*) *Wharton* v. *Mackenzie*, 5 Q. B., at p. 611.

(*i*) *Ryder* v. *Wombwell*, L. R. 4 Ex., at p. 41.

(*k*) *Wharton* v. *Mackenzie*, 5 Q. B., at p. 612.

(*l*) *Hart* v. *Prater*, 1 Jur. 623; 49 R. R. 746. Cp. *Clyde Cycle Co.* v. *Hargreaves*, 78 L. T. 296.

(*m*) *Bryant* v. *Richardson*, 14 L. T. 24. See also *Brooker* v. *Scott*, 11 M. & W. 27; 63 R. R. 517.

(*n*) *Ryder* v. *Wombwell*, L. R. 4 Ex., at p. 40.

(*o*) *Johnstone* v. *Marks*, 19 Q. B. D., at p. 511; 57 L. J. Q. B. 6.

(*p*) *Id.*, and *Barnes* v. *Toye*, 13 Q. B. D. 410; 52 L. J. Q. B. 567; *Nash* v. *Inman*, [1908] 2 K. B. 1; 77 L. J. K. B. 626; 98 L. T. 658.

s. 2 of the *Sale of Goods Act*, 1893, which, for the purposes of the Act, defines necessaries as " goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of the sale and delivery."

As in all other cases, questions of law are for the Judge; questions of fact are for the jury; but questions of fact ought not to be left to the jury unless there is evidence upon which they can *reasonably* find in the affirmative. Whether or not goods are " necessaries " is a question of fact for the jury, but there is in every case a preliminary question which is one of law, viz., whether there is any evidence on which the jury may properly find them to be necessaries, and in the absence of such evidence the Judge ought to withdraw the case from the jury and find for the defendant. The Judge therefore ought to withdraw the case from the jury either (i) where the goods are of such a kind that they cannot possibly be necessaries; or (ii) where the goods can be necessaries only by reason of exceptional circumstances, of which there is no evidence; or (iii) where there is no evidence that the goods were necessary to the actual requirements of the infant (*q*).

Contracts for necessaries are not, however, limited to contracts for goods, but include contracts for lodging, for work and labour done for the infant, or services rendered to him, as, *e.g.*, medical attendance and contracts for " education and instruction in the social state in which the infant is, and in which he may expect to find himself when he becomes an adult " (*r*). And an infant's contracts for service or employment are binding upon him if, upon the consideration of the whole contract, it is for his benefit, even though it contains terms that, standing alone, would not be for his advantage (*s*). But a mere trading contract is not binding upon an infant merely because it is for his benefit (*t*).

(*q*) *Ryder* v. *Wombwell*, (*ubi supra*); *Nash* v. *Inman* (*ubi supra*).

(*r*) *Roberts* v. *Gray*, [1913] 1 K. B., at p. 526; 82 L. J. K. B. 362. See also *Walter* v. *Everard*, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; 65 L. T. 443. A marriage settlement may also be a necessary (*Helps* v. *Clayton*, 17 C. B. (N.S.) 553; 34 L. J. C. P. 1; 142 R. R. 513).

(*s*) *Clements* v. *London and North Western Railway*, [1894] 2 Q. B. 482; 63 L. J. Q. B. 837; 70 L. T. 896; *Green* v. *Thompson*, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; 80 L. T. 691; *Roberts* v. *Gray* (*ubi supra*). But it is otherwise if there is any stipulation in the agreement which is of such a kind

(*t*) See note (*t*), p. 137.

The liability of an infant for necessaries is only as on simple contract. If, therefore, an infant enters into a covenant under seal for the payment of the price of necessaries, he cannot be sued simply upon the covenant without any enquiry into the consideration for it, but the case must be treated just as if there had been no deed (*u*). So also an infant cannot be sued upon his covenant to serve, contained in an apprenticeship deed (*x*); but where an infant has by a fair and reasonable apprenticeship deed covenanted to pay a premium, he may be sued for the premium in the same way as if it were the price of necessaries, and the fact that he has entered into a covenant under seal does not prevent him from being liable (*y*). But the rule that an infant cannot be sued upon a covenant to serve contained in an apprenticeship deed applies only to covenants which it is sought to enforce during the apprenticeship; it does not prevent the enforcement of a covenant to do or abstain from doing something after the apprenticeship has ceased, *e.g.*, a fair and reasonable restrictive covenant (*z*).

Children have no implied authority to act as agents for their parents, even for the supply of necessaries; and in order to charge a parent for the price of necessaries supplied to an infant child, it is necessary to show that they were supplied either by the authority or with the assent of the parent (*a*), though such authority or assent may be inferred from slight evidence (*b*).

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that it makes the contract an unfair one to the infant (*Corn* v. *Matthews*, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; 68 L. T. 480; see also *Flower* v. *London and North Western Railway*, [1894] 2 Q. B. 65; 63 L. J. Q. B. 547; 70 L. T. 829). An infant cannot repudiate an apprenticeship agreement unless the repudiation is for his benefit (*Waterman* v. *Fryer*, [1922] 1 K. B. 499; 91 L. J. K. B. 315; 126 L. T. 316; 38 T. L. R. 87).

(*t*) *Cowern* v. *Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865; see also *Ex p. Jones*, 18 Ch. D. 109; 50 L. J. Ch. 673.

(*u*) *Walter* v. *Everard*, [1891] 2 Q. B., at pp. 372, 373; 60 L. J. Q. B. 738; 65 L. T. 443; and see *Martin* v. *Gale*, *infra*, p. 138, n. (*c*).

(*x*) *Gilbert* v. *Fletcher* (1630), Cro. Car. 179. But "if he misbehave himself, the master may correct him in his service, or complain to a justice of the peace to have him punished" (*ibid.*). See also *De Francesco* v. *Barnum*, 43 Ch. D. 165; 59 L. J. Ch. 151; 62 L. T. 40.

(*y*) *Walter* v. *Everard* (*ubi supra*). But an infant's parents or friends who have covenanted to pay a premium may be sued upon their covenant (*ibid.*).

(*z*) *Gadd* v. *Thompson*, [1911] 1 K. B. 304; 80 L. J. K. B. 272. See also *Bromley* v. *Smith*, [1909] 2 K. B. 235; 78 L. J. K. B. 745; 100 L. T. 731.

(*a*) *Shelton* v. *Springett*, 11 C. B. 452; *Rolfe* v. *Abbott*, 6 C. & P. 286.

(*b*) *Law* v. *Wilkin*, 6 Ad. & E. 718; 6 L. J. K. B. 166; *Baker* v. *Keen*,

An infant was not at Common Law liable to repay money lent for the purpose of buying necessaries, and even a deed given by an infant to secure the repayment of such money was not binding upon him (*c*); but in Equity, if money lent to an infant was spent in payment for necessaries, the lender stood in the place of the creditor whose debt had been paid, and could recover from the infant in Equity as the creditor might have done at law (*d*). And when a person advances money to an infant to enable him to buy land and the money is so applied, the lender is entitled to stand in the place of the vendor and to enforce the vendor's lien upon the land (*e*).

An infant is not liable upon a bill of exchange or promissory note to which he was a party, though it was given for necessaries, but must be sued on the consideration for which it was given, *i.e.*, the original debt for the necessaries (*f*).

Void contracts.—All contracts of an infant other than for necessaries were at Common Law voidable. But by statute certain contracts have been made *void*.

By s. 1 of the *Infants' Relief Act*, 1874, it is enacted that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent (*g*), or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants, shall be absolutely *void*: provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." The same statute (*h*) also makes unenforceable all promises made

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2 Stark. 501. Both these cases are, however, doubted in *Shelton* v. *Springett* (*ubi supra*).

(*c*) *Martin* v. *Gale*, 4 Ch. D. 428; 46 L. J. Ch. 84.

(*d*) *Marlow* v. *Pitfield*, 1 P. Wms. 558; *Re National Permanent, &c., Society*, L. R. 5 Ch., at p. 313. The same rule applies to loans to a lunatic.

(*e*) *Nottingham, &c., Building Society* v. *Thurstan*, [1903] A. C. 6; 72 L. J. Ch. 134; 87 L. T. 529.

(*f*) *Re Soltykoff, ex p. Margrett*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339.

(*g*) See *Nottingham, &c., Society* v. *Thurstan* (*ubi supra*). But where a father and son were sued on a promissory note given in respect of a loan to the son, who was an infant, the father having joined in the note as a guarantor, it was held that the guarantee was good and the father was liable as guarantor (*Wauthier* v. *Wilson*, 27 T. L. R. 582).

(*h*) S. 2, see *post*, p. 139.

after full age to pay any debt contracted during infancy, and all ratifications after full age of contracts made during infancy; and so far as concerns loans contracted during infancy, its provisions have been extended by the *Betting and Loans (Infants) Act*, 1892 (*i*).

Voidable contracts.—All other contracts by an infant are voidable. The rule as to such a contract has been laid down as follows: "Has he to ratify it, or is it binding upon him until he elects to avoid it? It appears to me that this point has been long settled by authority. It is binding upon him until he repudiates it. Further, I take it, the law is well settled that he must repudiate it, if at all, within a reasonable time after he attains twenty-one" (*k*).

If a voidable contract is not repudiated within a reasonable time, the right to repudiate is lost, but it cannot be lost by any positive *ratification* (*l*). Before 1874 the rule was different, and an infant might by ratification lose his power to repudiate (*m*). But by the *Infants' Relief Act*, 1874 (*n*), it is provided that "no action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, *whether there shall or shall not be any new consideration for such promise or ratification after full age.*" Under this Act accordingly no contract of any kind is capable of ratification (*o*). By s. 5 of the *Betting and Loans (Infants) Act*, 1892, it is further provided that if any infant who has contracted a loan which is void in law agrees, after he comes of age, to pay any money which

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(*i*) *Infra.*

(*k*) *Carter* v. *Silber*, [1892] 2 Ch., at p. 284; 61 L. J. Ch. 401. Affirmed *sub nom. Edward* v. *Carter*, [1893] A. C. 360; 63 L. J. Ch. 100; 69 L. T. 153. See also *Carnell* v. *Harrison*, [1916] 1 Ch. 328; 85 L. J. Ch. 321; 114 L. T. 478.

(*l*) To this, however, there is an exception in certain cases which depend upon the doctrine of *equitable election*, see *Re Hodson's Settlement, Williams* v. *Knight*, [1894] 2 Ch. 421; 63 L. J. Ch. 609; 71 L. T. 77; see further Wilshere's Equity, Chapter III., s. 2. As to what constitutes ratification, see *post*, p. 141.

(*m*) Provided, after Lord Tenterden's Act (9 Geo. 4, c. 14, s. 5), that the ratification was in writing signed by the infant.

(*n*) S. 2.

(*o*) See *Smith* v. *King*, [1892] 2 Q. B. 543; 67 L. T. 420.

represents or is agreed to be paid in respect of such loan, such agreement and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan, shall be void absolutely as against all persons whomsoever.

Where "a person is sued upon obligations arising out of *property* which he has become possessed of under a contract, as shares in a company, he cannot avoid the obligation by the simple defence that he was an infant at the time of acquiring the property, he must further plead that before coming of age or within a reasonable time in that behalf after coming of age he repudiated the contract on that ground *and disclaimed the property*" (*p*). Thus an infant lessee who has taken possession cannot avoid his obligation to pay rent, unless he has disclaimed his interest in the lease (*q*).

And where an infant has actually paid money under a contract, whether voidable or void, and has received some benefit under the contract, so that he cannot replace the other party in the position in which he was before the contract, the infant cannot recover the money which he has paid (*r*). Thus in the case of *Valentini* v. *Canali* (*s*), an infant agreed to become tenant of a house and to pay the landlord £102 for the furniture. He paid £68, gave a promissory note for the balance, and occupied the house and used the furniture for several months. He then brought an action, claiming (i) a declaration that the contract was void, and (ii) the return of the £68. It was held that the contract was void, and the promissory note was ordered to be cancelled; but it was also held that the infant could not obtain repayment of the £68, because he had had the use of the furniture for some time and he could not give back this benefit

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(*p*) *Carter* v. *Silber* (*ubi supra*). Thus a person who during infancy becomes a shareholder in a company is liable for calls (*London and North Western Railway* v. *McMichael*, *infra*), and, in winding up, as a contributory (*Re Yeoland Consols*, 58 L. T. 922), unless he has repudiated the shares. As to infant partners, see *post*, Part II., Chapter I.

(*q*) *London and North Western Railway* v. *McMichael*, 20 L. J. Ex., at p. 101; 5 Ex. 114.

(*r*) *Holmes* v. *Blogg*, 8 Taunt. 508; 19 R. R. 445; as explained by *Corpe* v. *Overton* (*infra*).

(*s*) 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 731.

or restore the defendant to the position in which he was before the contract. But where an infant has received no benefit, so that there is a total failure of consideration, he can recover money paid under a void or voidable contract (*t*).

The infancy of one party to a contract does not affect the liability of the other party, so that, although an infant may not be liable upon a contract, he is capable of suing, subject to this—that he cannot sue for specific performance of a contract, for specific performance is granted only where the remedy is mutual (*u*).

Contracts of marriage.—A contract to marry is voidable by an infant, though he may sue the other party thereto. But an infant may become liable by a fresh promise made after coming of age, though not by a mere ratification. "A ratification necessarily has reference to the past, and . . . is simply an intentional recognition of some previous promise made . . . and an adoption and confirmation of such promise with the intention of rendering it binding. . . . There may or may not be any consideration for a ratification, but there must be a consideration for a new and independent promise" (*x*). Where there has been an express promise of marriage during infancy and the only subsequent evidence is of conduct on the part of the engaged couple consisting of continuing to treat one another as an engaged couple, without any evidence of words capable of being construed as a fresh promise, such conduct is mere evidence of ratification (*y*). But where there is evidence, not merely of such conduct, but that the defendant used language capable of being construed as a fresh promise, it is for the jury to find whether the words so used amount merely to a ratification of the promise made during infancy or whether they prove a fresh and independent agreement (*z*), in which the consideration for the

(*t*) *Corpe* v. *Overton*, 10 Bing. 252; 3 L. J. C. P. 24; 38 R. R. 422; *Steinberg* v. *Scala (Leeds), Ltd.*, [1923] 2 Ch. 452; 92 L. J. K. B. 944; 129 L. T. 624; 39 T. L. R. 542 (overruling, unless distinguishable on the facts, *Hamilton* v. *Vaughan Sherrin Electrical Co.*, [1894] 3 Ch. 589; 63 L. J. Ch. 795; 71 L. T. 325).

(*u*) *Flight* v. *Bolland*, 4 Russ. 298; 28 R. R. 101; see Wilshere's Equity, Chapter XIII. *Sed quære* whether contracts which are *void* under the Infants' Relief Act, 1874, can be enforced by the infant.

(*x*) *Ditcham* v. *Worrall*, 5 C. P. D., at p. 412; 49 L. J. C. P. 688.

(*y*) *Coxhead* v. *Mullis*, 3 C. P. D. 439; 47 L. J. C. P. 761.

(*z*) *Northcote* v. *Doughty*, 4 C. P. D. 385.

new promise by the defendant is a new reciprocal promise by the plaintiff (*a*).

Liability for torts. Equitable liability.—An infant is, in general, liable for his torts. But "he cannot be sued for a wrong when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract. . . . But if an infant's wrongful act, though concerned with the subject-matter of a contract and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable" (*b*). Thus, where a mare was hired by an infant, with an express stipulation that it was not to be jumped, but it was jumped at a fence and injured, it was held that the infant was liable, as this was not a breach of duty arising out of a contract but a trespass, "as distinct from the contract, as if the defendant had run a knife into her and killed her" (*c*). But where an infant, having hired a car for a particular journey, drove it for a longer journey, during which it was damaged without any fault on his part, it was held that he could not be made liable in tort. It was argued that the defendant was a trespasser during the extension of the journey, and as such was under an absolute liability in respect of the car. It was held, however, that "nothing that was done upon that journey made the defendant an independent tortfeasor . . . the extended journey was of the same nature as the original one, and the defendant did no more than drive the car further than was originally intended"; the claim, therefore, was, in substance, for breach of contract (*d*).

(*a*) *Ditcham* v. *Worrall* (*ubi supra*). In this case the defendant, after coming of age, asked the plaintiff to fix the wedding day, which she did. It was held that this was a fresh agreement, the consideration for the defendant's promise being the willingness of the plaintiff to marry as expressed when she fixed the day for the wedding. In *Northcote* v. *Doughty* (*ubi supra*), the defendant after coming of age said to the plaintiff: "Now I may and will marry you as soon as I can" to which she assented. Held, that the question whether this was or was not a new promise was properly left to the jury.

(*b*) Pollock on Torts (8th ed.), at p. 78. Approved by Kennedy, L.J., in *R. Leslie, Ltd.* v. *Sheill*, [1914] 3 K. B., at p. 620; 83 L. J. K. B. 1145; 111 L. T. 106; 30 T. L. R. 460.

(*c*) *Burnard* v. *Haggis*, 14 C. B. (N.S.) 45.

(*d*) *Fawcett* v. *Smethurst*, 84 L. J. K. B. 473; 112 L. T. 309; 31 T. R. 85;

So also, if goods other than necessaries are sold and delivered to an infant, he cannot be made liable for them in an action for conversion (*e*). Nor can he be sued for money had and received where the cause of action is *ex contractu* (*f*), though he may be if the cause of action is purely *ex delicto*, as, for example, where he has embezzled money entrusted to him (*g*).

At Common Law it was no answer to a plea of infancy that the defendant, in making the contract, had fraudulently misrepresented himself to be of full age (*h*); nor can an infant, at Common Law, be liable in tort on the ground that he has by such a fraudulent misrepresentation induced another party to contract with him (*i*); nor is he, in such a case, estopped from setting up that a contract made by him is void (*k*).

But, "when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a *contractual* obligation, entered into while he was an infant, even by means of a fraud" (*l*). Thus in one case an infant was ordered to return promissory notes, the surrender of which he had procured by falsely stating that he was of age, though a decree against him to pay the amount of the notes, although he had become of

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32 L. J. C. P. 189; 135 R. R. 593, following *Jennings* v. *Rundall*, 8 T. R. 335; 14 R. R. 680, where the facts were somewhat similar, and the Court held that a claim in contract could not be turned to one in tort by alleging that the act complained of was "wrongfully, injuriously and maliciously" done.

(*e*) *Jennings* v. *Rundall*, 8 T. R., at p. 337; 4 R. R. 680.

(*f*) *Cowern* v. *Nield*, [1912] 2 K. B. 419; 81 L. J. K. B. 865—*Held*, that, where an infant trader contracted to sell goods and was paid the price but failed to deliver the goods, the purchaser could not recover the price in an action for money had and received.

(*g*) *Bristow* v. *Eastman*, 1 Esp. 172; 5 R. R. 728; *Re Seager*, *Seeley* v. *Briggs*, 60 L. T. 665. But see *R. Leslie*, *Ltd. v. Shiell*, [1914] 3 K. B., at p. 621; 83 L. J. K. B. 1145. In the case of *Re Seager*, the defendant, while an infant, agreed an account of what was due from him, and after he came of age signed a memorandum promising to pay. It was argued that this memorandum was void as being a ratification of an account stated, but it was held that it constituted a new contract made to avoid the liability of being sued in tort.

(*h*) *Bartlett* v. *Wells*, 1 B. & S. 836; 31 L. J. Q. B. 57; 124 R. R. 774.

(*i*) *Johnson* v. *Pye*, 1 Sid. 258; *R. Leslie*, *Ltd.* v. *Shiell*, [1914] 3 K. B., at p. 612.

(*k*) *Levene* v. *Brougham*, 25 T. L. R. 265.

(*l*) *R. Leslie*, *Ltd.* v. *Sheill*, [1914] 3 K. B., at p. 618.

age, was expressly refused (*m*). And where an infant obtained a lease of a furnished house upon an implied representation that he was of age, it was held that, though the lease must be declared void and possession must be given up, yet the infant was not liable for use and occupation (*n*). So also, where an infant has by fraud obtained property which he has sold, so that he cannot return it, he may be liable in Equity to account for the proceeds (*o*). But the remedy in Equity is only proprietary, and if there is no possibility of restoring the very thing obtained or its actual and traceable proceeds, the infant cannot be made liable by a judgment *in personam* for a sum equivalent to that which he has gained by his fraud. Accordingly, where an infant, by a fraudulent misrepresentation as to his age, obtained a loan of money which was paid to him to be used as his own and was so used, it was held that no action would lie against him to recover the amount of the advances on the ground that they had been obtained by fraudulent misrepresentation, or, in the alternative, for money had and received to the use of the plaintiff, the cause of action in either case being in substance *ex contractu*. It was further held that the defendant was under no equitable liability to the plaintiff, because there was no question of accounting and no possibility of restoring or tracing the very thing got by the fraud, so that any judgment would be a personal judgment to pay an equivalent sum and so merely a judgment in debt to repay the loan, thus enforcing a void contract (*p*).

Married Women.

At Common Law a married woman, though she could contract as agent for her husband, could not, in general, have any personal rights or liabilities; by her marriage her personalty, for most purposes, vested in that of her husband, to whom, during the coverture, her property and rights passed and who became liable, jointly with her, for her torts and, solely, upon contracts made by her as his agent (*q*). The general Common Law rule was

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(*m*) *Clarke* v. *Cobley*, 2 Cox, 173; 2 R. R. 25.
(*n*) *Lempriere* v. *Lange*, 12 Ch. D. 675.
(*o*) *Stocks* v. *Wilson*, [1913] 2 K. B. 235; 82 L. J. K. B. 598.
(*p*) *R. Leslie, Ltd.* v. *Sheill* (*ubi supra*).
(*q*) See *Johnson* v. *Clark*, [1908] 1 Ch., at p. 312; 77 L. J. Ch. 127;

that "a *feme covert* is unquestionably incapable of binding herself by a contract; it is altogether void" (*r*); but, even at Common Law, there were exceptional cases in which a married woman could contract as a *feme sole*, as, *e.g.*, (i) when her husband was civilly dead (*s*); or (ii) by the custom of London, when she was the wife of a freeman and carried on trade separately from her husband (*t*); or (iii) when the contract was the compromise of any legal proceedings which a husband and wife are by law capable of taking against each other (*u*). And when a promise was made to a married woman upon a consideration proceeding from her solely, as in the case of a contract to pay for her services, or where a bond or note was given to a married woman, she thereby acquired a *chose in action* (*x*) upon which she could sue jointly with her husband and which, on the death of her husband, would survive to her unless he had reduced it into possession (*y*).

Further exceptions were added by statute.

By the *Divorce and Matrimonial Causes Act*, 1857, a wife judicially separated from her husband is considered as a *feme sole* with regard to property of every description which she may subsequently acquire (*z*), and for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceedings (*a*). And, by the same statute, a wife deserted by her husband may obtain from a magistrate a protection order, which puts her in the same position while the desertion continues (*b*).

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98 L. T. 129; 24 T. L. R. 156; *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919.

(*r*) *Fairhurst* v. *Liverpool Loan Association*, 23 L. J. Ex., at p. 164.

(*s*) See *Ex p. Franks*, 7 Bing. 762. The only case in which this is now possible is where the husband has been convicted of felony and is not lawfully at large under a licence (see Pollock's Contracts, p. 82).

(*t*) See Pollock's Contracts, p. 83.

(*u*) *McGregor* v. *McGregor*, 21 Q. B. D., at p. 430; 57 L. J. Q. B. 591.

(*x*) For an explanation of this expression, see *post*, p. 163.

(*y*) Bullen and Leake's Pleadings (3rd ed.), pp. 171, 172, and cases there cited; as to reduction into possession, see also *post*, p. 149.

(*z*) S. 25.

(*a*) S. 26.

(*b*) S. 21. For a discussion of these sections see *Hill* v. *Cooper*, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423; 69 L. T. 216. The same consequences follow a dissolution of marriage (*Wilkinson* v. *Gibson*, L. R. 4 Eq. 162; 36 L. J. Ch. 646).

By the *Summary Jurisdiction (Married Women) Act*, 1895 (*c*), a separation order obtained under the Act from a Court of summary jurisdiction has the same effect as a decree for judicial separation.

Apart from the foregoing exceptions at Common Law and by statute, a married woman can contract only either (1) as agent (*d*), or (2) with respect to her separate property.

Contracts by a married woman with respect to her separate property.—In Equity it was settled in modern times that property might be given to a married woman for her *separate use* (*e*), and that with respect to such *equitable* separate property she had all the rights and powers of a person who was *sui juris* (*f*). Her powers of alienation might, however, be restricted by a provision in the settlement restraining her from anticipating or alienating such separate property.

Subject to any such restraint, a married woman might contract with regard to her separate property as a *feme sole* and not as agent for her husband: whether she did so contract depended upon the facts of each particular case (*g*). But the sole remedy of her creditors was against her separate estate; she was not personally liable (*h*).

By the *Married Women's Property Act*, 1870, it was provided that certain kinds of property belonging to a married woman should be deemed to be held by her to her separate use, and she was given certain powers of suing in her own name.

By the *Married Women's Property Act*, 1882, a married woman was made capable of entering into and rendering herself liable *in respect of and to the extent of her separate property* on any contract, and of suing and being sued in all respects as if she were a *feme sole*, without the joinder of her husband as plaintiff or defendant (*i*).

(*c*) 58 & 59 Vict. c. 39, s. 5, replacing 41 Vict. c. 19, s. 4.

(*d*) See *post*, Part II., Chapter I.

(*e*) See *Fettiplace* v. *Gorges*, 1 Ves. jun. 46; 1 R. R. 79; *Taylor* v. *Meads*, 4 De G. J. & S. 597; 34 L. J. Ch. 203; 146 R. R. 471; *Cooper* v. *Macdonald*, 7 Ch. D. 288; 47 L. J. Ch. 373. See also Wilshere's Equity, Chapter VI.

(*f*) *Taylor* v. *Meads*, 4 De G. J. & S., at p. 603; 34 L. J. Ch. 203; 146 R. R. 471.

(*g*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 502; 30 L. J. Ch. 298; 103 R. R. 223; *Mrs. Matthewman's Case*, L. R. 3 Eq. 787; 36 L. J. Ch. 90.

(*h*) *Atwood* v. *Chichester*, 3 Q. B. D. 722; 47 L. J. Q. B. 300.

(*i*) 45 & 46 Vict. c. 75, s. 1 (2).

Separate property under the Act comprises

i. In case of a woman married after 1882—all property belonging to her at marriage, or acquired by her or devolving upon her after marriage (*k*):

ii. In case of a woman married before 1883—all property, her title to which shall accrue after 1882 (*l*).

The *Married Women's Property Act*, 1893, removed certain difficulties caused by the Act of 1882, and provides (*m*) that—

"Every contract hereafter (*n*) entered into by a married woman *otherwise than as agent*—

(i.) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract (*o*);

(ii.) Shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

(iii.) Shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to."

But the same section further provides that nothing shall render available to satisfy any liability or obligation arising out of such contract any property which at that time or thereafter she was restrained from anticipating. Accordingly if at the date of the contract the married woman is restrained from anticipating her existing separate property, or if she subsequently acquires separate property subject to a restraint, such property cannot be made liable if it afterwards becomes free from the restraint (*p*).

(*k*) *Id.*, s. 2.

(*l*) *Id.*, s. 5.

(*m*) 56 & 57 Vict. c. 63, s. 1, repealing s. 1 (3) (4) of the Act of 1882.

(*n*) After December 5, 1893.

(*o*) Under the Act of 1882 a married woman might prove that she had not in fact contracted with regard to her separate property, and her subsequently acquired separate property was not liable unless she had some separate property at the time of the contract.

(*p*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; 69 L. J. Q. B. 955; 83 L. T. 301; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; 73 L. J. K. B. 35; 89 L. T. 424; *Wood* v. *Lewis*, [1914] 3 K. B. 73; 83 L. J. K. B. 1046; 110 L. T. 994.

The restraint ceases (i) when she becomes discovert; (ii) when income is actually in her hands or due and payable to her (see *Wood* v. *Lewis*, *ubi supra*). It may *for certain purposes* be removed by the Court, see Wilshere's Equity, Chapter VI.

But, in any action brought against a married woman by virtue of these Acts her creditor can obtain satisfaction only out of her separate property and not otherwise (*q*). She is subject only to a proprietary liability; the judgment creates no debt due from her personally within the meaning of s. 5 of the Debtors Act, 1869, and she cannot, therefore, on non-payment be committed upon a judgment summons under that Act (*r*).

A married woman who carried on trade separately from her husband was, in respect of her separate property, made subject to the bankruptcy laws by the Act of 1882, but proceedings in bankruptcy could not be founded upon her non-compliance with a *bankruptcy notice*, as this notice requires the debtor to pay *personally* and therefore could not be served upon a married woman. Now, however, by s. 125 of the *Bankruptcy Act*, 1914, where a married woman carries on a trade or business, *whether separately from her husband or not*, she is liable to the bankruptcy laws as if she were a *feme sole*, and a final judgment or order is available for bankruptcy proceedings against her as though she were personally bound to pay the judgment debt or sum ordered to be paid.

For her torts a married woman is liable, jointly with her husband, or separately if she survives. At Common Law the same principle applied to the torts of a married woman as to torts of an infant, so that he could not be sued in tort for a fraud which was directly connected with a contract made with her and was the means of effecting it and parcel of the same transaction, as, *e.g.*, where the contract was induced by a fraudulent representation that she was a *feme sole* (*s*). This Common Law rule was, however, abrogated by s. 1 (2) of the Married Women's Property Act, 1882 (*t*), under which she can be sued in all respects as a *feme sole*, though her liability is limited to her separate property.

(*q*) Married Women's Property Act, 1882, s. 1 (2).

(*r*) *Scott* v. *Morley*, 20 Q. B. D. 120; 57 L. J. Q. B. 43; 57 L. T. 919; where the form of judgment against a married woman was settled. This rule does not apply to a judgment obtained against a married woman *personally* in respect of an *ante-nuptial debt* (*post*, p. 149), and a married woman may be attached for non-payment of money in her possession in a fiduciary capacity (*Re Turnbull, Turnbull* v. *Nicholas*, [1900] 1 Ch. 180; 69 L. J. Ch. 187).

(*s*) *Liverpool Adelphi Loan Association* v. *Fairhurst*, 9 Ex., at p. 429; 23 L. J. Ex. 124.

(*t*) *Ante*, p. 146.

Antenuptial Contracts of a Married Woman.

A. *Rights.*—If a woman had, before her marriage, any right under a contract, such right, being a *chose in action*, passed to her husband if reduced into possession by him during the coverture, so that he had absolute control over it without any concurrence by her, as, for instance, by actual payment or transfer to him or by his obtaining judgment for it in his own name (*x*). If the husband died without reducing into possession the wife's *choses in action*, they survived to her. If, before they had been reduced into possession, the wife died, she had no power to dispose of them, and they passed to the husband; if she made a will, her executors alone could recover them, but held them as trustees for the husband; if she died intestate, the husband was entitled to them, but, as they were assets of the wife, his legal title was not complete until he had taken out letters of administration to her; in either case, however, any antenuptial debts of the wife were payable out of her *choses in action* so passing to her husband (*y*).

By s. 5 of the *Married Women's Property Act*, 1882, all *choses in action* belonging to a woman at the date of her marriage, if married after 1882, or acquired by any married woman after 1882, belong to her as her legal separate property, subject to the revival of her husband's Common Law rights on her intestacy (*z*).

B. *Liabilities.*—For her antenuptial contracts a married woman was at Common Law *personally liable*, and this liability is unaffected by the Married Women's Property Acts (*a*). But by ss. 13 and 19 of the *Married Women's Property Act*, 1882, she is *also* liable to the extent of her separate property *not* restrained from anticipation (*b*).

Her husband was at Common Law liable, *jointly* with her, for her ante-nuptial contracts (*c*), but his liability ended with her

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(*x*) See Williams' Personal Property, p. 612; Wilshere's Equity, Chapter VI., and for an explanation of the term "reduction into possession," see *Nicholson* v. *Drury Estate Co.*, 7 Ch. D., at p. 55; 47 L. J. Ch. 192.

(*y*) See *Smart* v. *Tranter*, 43 Ch. D. 587; 59 L. J. Ch. 363; 62 L. T. 356.

(*z*) *Smart* v. *Tranter (ubi supra)*.

(*a*) *Robinson, King & Co.* v. *Lynes*, [1894] 2 Q. B. 577; 63 L. J. Q. B. 49; 47 L. T. 624.

(*b*) *Birmingham Excelsior Society* v. *Lane*, [1904] 1 K. B. 35; 73 L. J. K. B. 28; 89 L. T. 656; 20 L. T. R. 47.

(*c*) *Beck* v. *Pierce*, 23 Q. B. D., at p. 320; 58 L. J. Q. B. 516; 61 L. T. 448.

death unless, as her administrator, he became liable to satisfy her debts out of her assets.

By s. 12 of the *Married Women's Property Act*, 1870, this liability of the husband was removed in the case of marriages after the Act. But by the *Married Women's Property Act*, 1874, it was provided that, as respects marriages after the passing of the Act (July 30, 1874) the husband and wife might be *jointly* (*d*) sued for antenuptial debts of the wife, but that the husband should be liable only to the extent of the assets acquired by him through his wife as therein stated (*e*).

By the *Married Women's Property Act*, 1882, the Acts of 1870 and 1874 were repealed except as regards the rights and liabilities of persons married before January 1, 1883 (*f*). But by s. 14 the husband is liable for his wife's antenuptial contracts to the extent only of any separate property which he has acquired from or through his wife, after deducting any previous payments made by him in respect of such liabilities. He may, under this section, be sued *alone and whether his wife be alive or dead*; or, under s. 15, he may be sued *jointly* with her if the plaintiff seek to establish his claim, either wholly or in part, against both of them; but by s. 13, as between husband and wife, the separate property of the wife is to be deemed primarily liable, so that the husband is entitled to be indemnified out of it (*g*).

Persons of Unsound Mind and Drunken Persons.—An idiot is a person who is insane from birth, without any lucid intervals; a lunatic is a person who by some cause has become insane, either totally or partially, and either with or without lucid intervals (*h*).

The general rule is that the contract of a person who is so insane (*i*) or drunk (*k*) as not to be capable of understanding the

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(*d*) See *Bell* v. *Stocker*, 10 Q. B. D. 129; 52 L. J. Q. B. 49.

(*e*) 37 & 38 Vict. c. 50, ss. 1, 2, 5. (*f*) 45 & 46 Vict. c. 75, s. 22.

(*g*) *Beck* v. *Pierce* (*ubi supra*). If a plaintiff obtained judgment against a married woman for an antenuptial debt, but the judgment remains unsatisfied because she has no separate estate, it is no bar to a subsequent action against her husband, who had assets with her and might therefore have been sued in the first instance (*id*).

(*h*) See Encyclopædia of the Laws of England, tit. Lunacy.

(*i*) *Imperial Loan Co.* v. *Stone*, [1892] 1 Q. B. 599; 61 L. J. Q. B. 449; 66 L. T. 556.

(*k*) *Matthews* v. *Baxter*, L. R. 8 Ex. 132; 42 L. J. Ex. 73.

transaction is *voidable* if he can prove that the person with whom he contracted knew of his condition at the time of the contract. But a lunatic, even though so found by inquisition, can make a valid contract during a lucid interval (*l*). And, at Common Law, whenever necessaries are supplied, or money is spent for their supply, to a person who by reason of disability cannot contract, the law implies an obligation on his part to pay for such necessaries out of his own property, provided that the provision of such money or necessaries is made under circumstances which would justify the Court in implying such an obligation to repay (*m*).

This rule is now embodied in s. 2 of the *Sale of Goods Act*, 1893, which provides that when "necessaries" as therein defined (*n*) are sold and delivered to . . . a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

The mere existence of a delusion in the mind of a contracting party, even though connected with the subject-matter of the contract, is not sufficient to avoid the contract unless it is found as a fact that it affected his competency to make the particular contract (*o*).

Aliens.—An alien is defined by the *British Nationality and Status of Aliens Acts*, 1914 *to* 1922, as a person who either is not a natural-born British subject or has not been granted a certificate of naturalisation (*p*), or has not become a subject of His Majesty by reason of any annexation of territory (*q*).

(*l*) *Hall* v. *Warren*, 9 Ves., at p. 609; 7 R. R. 306. But, so long as the inquisition has not been superseded, he cannot execute a valid deed dealing with or disposing of his property (*Re Walker*, [1905] 1 Ch. 160; 74 L. J. Ch. 86).

(*m*) *Re Rhodes*, *Rhodes* v. *Rhodes*, 44 Ch. D. 94; 59 L. J. Ch. 298. In this case the Court refused to imply such an obligation because money expended for the lunatic was not so expended with any intention on the part of the person who provided it that he should be repaid and the constitution of any debt between himself and the lunatic was not contemplated.

(*n*) *Ante*, p. 136.

(*o*) *Jenkins* v. *Morris*, 14 Ch. D. 972; 45 L. T. 589.

(*p*) 4 & 5 Geo. 5, c. 17, s. 27.

(*q*) 8 & 9 Geo. 5, c. 38, s. 2 (6). The term "natural-born" British subject is defined by s. 1 of the Act of 1914, as amended by s. 2 (1) of the Act of 1918 and s. 1 (1) of the Act of 1922. The status of married women and infant children is also governed by ss. 10 to 12 of the Act of 1914, as amended by s. 2 (5) of the Act of 1918.

An alien friend resident in this country has, generally speaking, all the civil rights of a British subject, including the right to contract, the right to sue in the King's Courts (*r*), and the right to hold real and personal property of every description, except a British ship (*s*).

Alien enemies.—The term "alien enemy" indicates, in its natural meaning, a subject of enemy nationality, that is, of a State at war with the King; but, in considering the enforcement of civil rights, the test is not nationality but residence or place of business, and accordingly a person voluntarily resident in or carrying on business in an enemy country is treated as an alien enemy, though he is a subject of the British Crown or of a neutral State: and conversely, the subject of a State at war with this country but who is carrying on business here or in a foreign neutral country, is not treated as an alien enemy (*t*).

An alien enemy, unless here by the licence or under the protection of the Crown (*u*), cannot sue or proceed in the civil Courts of the realm, his rights being suspended during the war (*x*). But, if effective notice of the proceedings can be served upon him, he can be sued and proceeded against during the war, and can take all steps necessary for his defence and can appeal, unless before the war judgment was given against him in an action in which he was plaintiff, in which case his right to appeal is suspended (*y*).

The outbreak of war renders it unlawful for a British subject to engage in any intercourse, commercial or otherwise, with the enemy, except by licence of the Crown (*z*), and renders illegal the formation or performance of any contract involving such inter-

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(*r*) *Porter* v. *Freudenberg*, [1915] 1 K. B., at p. 869; 84 L. J. K. B. 1001; 31 T. L. R. 162; *Johnstone* v. *Pedlar*, [1921] 2 A. C., at pp. 276, 277; 90 L. J. P. C. 131; 125 L. T. 809; 37 T. L. R. 870.

(*s*) 4 & 5 Geo. 5, c. 17, s. 17.

(*t*) *Porter* v. *Freudenberg*, [1915] 1 K. B., at pp. 867—869; 84 L. J. K. B. 1001; 31 T. L. R. 162. As to companies, see *Daimler Company, Ltd.* v. *Continental Tyre, etc., Co.*, [1916] 2 A. C. 307; 85 L. J. K. B. 1333; 114 L. T. 1049; 32 T. L. R. 624.

(*u*) *Schaffenius* v. *Goldberg*, [1916] 1 K. B. 284; 85 L. J. K. B. 374; 113 L. T. 949; 32 T. L. R. 133.

(*x*) *Porter* v. *Freudenberg*, [1915] 1 K. B., at pp. 873, 880.

(*y*) *Id.*, at pp. 883, 884, 887.

(*z*) *Halsey* v. *Lowenfeld*, [1916] 2 K. B., at p. 716; 85 L. J. K. B. 1498.

course (*a*), though it does not avoid a contract which does not involve such intercourse (*b*). But, even where the continued existence of contractual relations is unlawful, accrued rights are not affected, though the right of suing in respect thereof is suspended (*c*); thus, though a contract of partnership between a British subject and an alien enemy is dissolved by the outbreak of war, the property of the latter is not confiscated, though his right to have it back is suspended during the war; the English partner, therefore, remains a trustee for the alien enemy partner, and at the end of the war must account to him for any profits made by the use of his property (*d*).

Corporations.—A corporation may exist at Common Law, or by prescription, or may be created by Royal Charter, Letters Patent, or by or under the provisions of an Act of Parliament.

The general rule is that a corporation has, as an incident given by law, the same power to contract that a natural person has: but this capacity may, in the case of a corporation created by statute, be restricted by the statute which creates and regulates it (*e*). The most important illustration of this restriction occurs in companies incorporated under the *Companies (Consolidation) Act*, 1908, which codifies the law existing in the previous Acts of 1862 to 1908. Under this Act, following a principle introduced by the Act of 1862, all that is required for the formation of a company is seven signatures to a document called a *memorandum of association;* this document is delivered to the Registrar

(*a*) *Zinc Corporation, Ltd.* v. *Hirsch*, [1916] 1 K. B. 541; 85 L. J. K. B. 565; 114 L. T. 222; 32 T. L. R. 232; *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A. C. 260; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208.

(*b*) *Halsey* v. *Lowenfeld*, [1916] 2 K. B. 707; 115 L. T. 617; 32 T. L. R. 709 (covenants by a lessee who became an alien enemy held not to be extinguished or suspended); *Seligman* v. *Eagle Insurance Co.*, [1917] 1 Ch. 519; 86 L. J. Ch. 353; 116 L. T. 146 (policy of insurance held not to be void merely because the insured became an alien enemy); *Tingley* v. *Müller*, [1917] 2 Ch. 144; 86 L. J. Ch. 265; 116 L. T. 482; 33 T. L. R. 369 (an irrevocable power of attorney is not avoided by the donor subsequently becoming a public enemy). See also [1918] A. C., at p. 269.

(*c*) [1918] A. C., at p. 269.

(*d*) *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239; 87 L. J. K. B. 416; 118 L. T. 126; 34 T. L. R. 206.

(*e*) *Baroness Wenlock* v. *River Dee Co.*, 36 Ch. D., at p. 685; 53 L. J. Q. B. 208; see also *Ashbury Railway, etc., Co.* v. *Riche*, L. R. 9 Ex., at p. 263; 44 L. J. Ex. 185.

of Companies, who registers it and gives a certificate of incorporation, which is conclusive evidence that the company is duly registered under the Act (*f*).

A company may be unlimited, or may be limited by shares or by guarantee (*g*). Any association consisting of seven or more persons (or, in the case of a private company, any two or more persons) *may* be registered under the Act. Any association or partnership formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership, and consists of more than twenty persons (or, if formed for the purpose of carrying on banking, more than ten persons) *must* be registered under the Act, unless it is formed in pursuance of some other Act, or of letters patent, or is a company engaged in working mines within the stannaries (*h*). An association which ought to be, but is not, registered is an illegal association, and all contracts made for the purpose of carrying on its business are therefore illegal (*i*).

The company when incorporated becomes a new legal entity, entirely distinct from its members (*k*). The direct remedy of its creditors is, therefore, solely against the company and not its members, and it is only to the assets of the company that the creditor can look (*l*). But if a company is wound up, its members may be liable to contribute to its assets for the purpose of payment of its debts. If the company is unlimited, the liability of its members is unlimited; if it is limited by guarantee, their liability is limited by their guarantee; if it is limited by shares, their liability is limited to the amount unpaid on their shares.

The memorandum of association *must* state the *objects* of the

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(*f*) Companies (Consolidation) Act, 1908, ss. 15, 16, 17. See *Salomon* v. *Salomon & Co.*, [1897] A. C., at pp. 51, 52; 66 L. J. Ch. 35; 75 L. T. 426.

(*g*) *Id.*, ss. 3, 4, 5.

(*h*) *Id.*, ss. 1, 2. A private company is defined by s. 121 of the Act of 1908, as amended by s. 1 (2) of the Companies Act, 1913.

(*i*) *Jennings* v. *Hammond*, 9 Q. B. D. 225; 51 L. J. Q. B. 493; *Shaw* v. *Benson*, 11 Q. B. D. 563; 52 L. J. Q. B. 575. Cp. *Re Padstow Assurance Association*, 20 Ch. D. 137; 45 L. T. 774. See also *Smith* v. *Anderson*, 15 Ch. D. 247; 51 L. J. Ch. 344; 50 L. J. Ch. 39; *Crowther* v. *Thorley*, 50 L. T. 53.

(*k*) *Salomon* v. *Salomon & Co.* (*ubi supra*).

(*l*) *Oakes* v. *Turquand*, L. R. 2 H. L., at p. 357; 36 L. J. Ch. 949; 16 L. T. 808.

company, which is incorporated only for the purposes and objects contained in the memorandum. Accordingly, any contract made for purposes or objects foreign to or inconsistent with the memorandum are *ultra vires* the company and void *ab initio*, and incapable of ratification (*m*).

A company, though duly incorporated, may not commence business until it has complied with certain requirements of the Act of 1908, and any contract made by the company before the date on which it is entitled to commence business is provisional only, and not binding upon the company until that date, but on that date it becomes binding without any confirmation (*n*).

Shares in a registered company are personal estate, and are transferred in the manner provided for by the articles of association (*o*). If they are fully paid up, the company may issue a *share warrant*, stating that the bearer thereof is entitled to the shares therein specified, and the shares may then be transferred by delivery of the warrant (*p*).

Unincorporated associations.—In the case of an unincorporated association, such as a club, the only person liable upon a contract made upon its behalf is the person who actually made or authorised the contract, and he can escape liability only by showing that the other party expressly or impliedly undertook to look for payment to the funds of the association only (*q*).

The person making the contract is *prima facie* liable, but he can escape liability by showing that he gave the order on behalf of someone from whom he had authority (*r*). If he has authority from a committee of the club or association, the committee will in turn be liable unless it had express authority from the members

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(*m*) See *Ashbury Railway, etc., Co.* v. *Riche*, L. R. 7 H. L. 671; 44 L. J. Ex. 185; 33 L. T. 451; *Att.-Gen.* v. *Great Eastern Railway Co.*, 5 A. C. 473; 49 L. J. Ch. 545; 42 L. T. 810; *London County Council* v. *Att.-Gen.*, [1901] A. C. 26; 70 L. J. K. B. 77; 83 L. T. 605. The memorandum of association must be carefully distinguished from the *articles* of association; the latter are merely the internal regulations of the company, and, provided that they keep within the memorandum, the shareholders may make such regulations as they think fit; the company may moreover ratify a transaction which is merely *ultra vires* the articles.

(*n*) 8 Edw. 7, c. 69, s. 87. This does not apply to private companies.

(*o*) S. 22.

(*p*) S. 37.

(*q*) *Steele* v. *Gourley and Davis*, 3 T. L. R. 772; and see *Coutts* v. *Irish Exhibition*, 7 T. L. R. 313, and *Overton* v. *Hewett*, 3 T. L. R. 246.

(*r*) *Todd* v. *Emly*, 10 L. J. Ex., at p. 162; 7 M. & W. 427.

of the club, or such authority can be implied from the fact that the contract was within the purposes for which the committee was appointed (*s*). But an individual member of a club, or a committee of a club, is not personally liable unless he has pledged his credit or given authority to someone to do so (*t*). Accordingly, where some members only of a committee enter into a contract, the remaining members are not liable unless the jury find that they gave authority to the other members to bind them, or that the committee as a whole agreed to be bound by the acts of its individual members (*u*).

Professional Incapacities.—It has already been pointed out that the exercise of certain professions and occupations is governed in many cases by statutes which often make void or illegal any transactions contrary to their provisions. There are, however, certain cases in which merely the remedy by action is affected.

Barristers.—A barrister engaged as an advocate in litigation acts in an honorary capacity, and cannot under either an express or implied agreement recover his fees; "the relation of counsel and client renders the parties mutually incapable of making any legal contract of hiring and service concerning advocacy in litigation" (*x*). But this rule applies only to cases in which the relation of counsel and client exists, not to contracts not involving that relationship (*y*).

Solicitors.—A solicitor is an agent for his client, and his prin-

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(*s*) *Id.*

(*t*) *Overton* v. *Hewett*, 3 T. L. R. 246; *Draper* v. *Earl Manvers*, 9 T. L. R. 752.

(*u*) *Todd* v. *Emly*, 10 L. J. Ex. 262; 8 M. & W. 305. In the case of a club no member *as such* is liable to pay to the funds of the society or to anyone else any money beyond the subscription required by the rules of the club; he cannot therefore be personally liable to indemnify the trustees of the club to any amount beyond that subscription (*Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 139; 72 L. J. P. C. 31).

(*x*) *Kennedy* v. *Broun*, 13 C. B. (N.S.), at p. 727; 32 L. J. C. P. 137; *Broun* v. *Kennedy*, 33 L. J. Ch. 342. Even if the client has paid the fee to the solicitor the advocate cannot recover it from the solicitor as money paid to his use (*Re Le Brasseur and Oakley*, [1896] 2 Ch., at pp. 493, 494; 65 L. J. Ch. 763). Conversely a barrister is not liable for failing to render services for which he is retained (*Turner* v. *Phillips*, Peake, 122); or for negligence (*Fell* v. *Brown*, Peake, 96; 3 R. R. 663); and see *Swinfen* v. *Lord Chelmsford*, 29 L. J. Ex. 382; 2 L. T. 406.

(*y*) 13 C. B. (N.S.), at p. 729.

cipal duties, liabilities and rights as such will be considered later (*z*).

A solicitor cannot maintain any action to recover any "fee, reward or disbursement" in respect of anything done by him as solicitor unless he had in force, at the time when it was done, a duly stamped certificate to practise (*a*). Apart from express agreement, the amount of a solicitor's remuneration is governed (i) in contentious business, by Rules of Court; (ii) in non-contentious business, by the Solicitors Remuneration Act, 1881, and the Remuneration Order, 1882, as amended by subsequent Statutory Rules and Orders.

By s. 37 of the Solicitors Act, 1843, no solicitor can bring an action for his professional fees, charges or disbursements, until the expiration of a calendar month (*b*) after he has delivered a properly signed bill to the person to be charged: he may, however, obtain the leave of the Court to bring his action before the month has expired if he can satisfy the Court that there is probable cause for believing that the party chargeable is about to quit England, or to become a bankrupt, or compound with his creditors, or to do any other act which in the opinion of the Court would tend to defeat or delay payment (*c*).

By s. 37 of the Act of 1843 provisions are made for reference of the bill to taxation on the application of the party chargeable, and accordingly it must contain full particulars of the business done and of the charges made in sufficient detail to enable it to be taxed and to enable the client to be advised whether it ought to be taxed (*d*). The bill must be signed by the solicitor (or in the case of a partnership, by any of the partners, either in his own name or the firm name) or his personal representative or assignee, or must be enclosed in or accompanied by a letter so signed, and referring to the bill (*e*). The Act only makes the

(*z*) See *post*, Part II., Chapter I.

(*a*) Solicitors Act, 1843, s. 26; Solicitors Act, 1860, s. 26; Stamp Act, 1891, s. 43 (1).

(*b*) *Id.*, s. 48. The Statute of Limitations runs from the completion of the work, and not from the expiration of the month: *Coburn* v. *Colledge*, [1897] 1 Q. B. 702; 66 L. J. Q. B. 462; 76 L. T. 608.

(*c*) Legal Practitioners Act, 1875, s. 2.

(*d*) *Keene* v. *Ward*, 13 Q. B. 515; *Philby* v. *Hazle*, 8 C. B. (N.S.) 647; 125 R. R. 831; 29 L. J. C. P. 370; *Cobbett* v. *Wood*, [1908] 2 K. B. 420; 77 L. J. K. B. 878; 99 L. T. 482; 24 T. L. R. 615.

(*e*) Solicitors Act, 1843, s. 37.

delivery of a signed bill a condition precedent to the maintenance of an action, it does not therefore prevent a solicitor from setting off his costs in an action brought against him by his client (*f*). Moreover, it only applies to the recovery of "fees, charges or disbursements" and does not prevent a solicitor from suing on a promissory note given in respect of fees (*g*), nor on an account stated with reference to the balance of two cross claims, one of which has nothing to do with his bill (*h*).

In consequence of the fiduciary relationship between a solicitor and his client, it was difficult, before 1870, for a solicitor to enforce against his client any special agreement giving him a greater benefit than his ordinary remuneration: if, however, a special agreement was favourable to the client there was no difficulty in enforcing it (*i*). Now, however, a solicitor has a statutory right of making a special *written* agreement binding upon his client; but the statutes by which the right is given merely remove the disabilities of the solicitor and do not affect the Common Law rights of the client, who may therefore still set up against the solicitor an agreement which is not in writing (*k*).

Special agreements relating to contentious business are governed by the Attorneys and Solicitors Act, 1870. The agreement must be in writing (*l*); it may relate to past or future services and charges; it may provide for payment by a gross sum or by commission, percentage, salary, or otherwise (*m*); but the amount payable under the agreement is not to be received by the solicitor until the agreement has been examined and allowed by a taxing master. If he considers that it is not fair and reasonable, he may require the opinion of the Court to be taken thereon, and the Court may reduce the amount payable or may

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(*f*) *Brown* v. *Tibbits*, 11 C. B. (N.S.) 855; 31 L. J. C. P. 206.

(*g*) *Jeffreys* v. *Evans*, 14 M. & W. 210.

(*h*) *Turner* v. *Willis* [1905] 1 K. B. 468; 74 L. J. K. B. 365; 92 L. T. 412.

(*i*) *Clare* v. *Joseph*, [1907] 2 K. B. 369; 76 L. J. K. B. 724; 96 L. T. 770; 23 T. L. R. 398; *Gundry* v. *Sainsbury*, [1910] 1 K. B. 645; 79 L. J. K. B. 713; 102 L. T. 440; 26 T. L. R. 321.

(*k*) *Clare* v. *Joseph (ubi supra)*; *Gundry* v. *Sainsbury (ubi supra)*.

(*l*) A document signed by the client alone may be a sufficient agreement: *Re Jones*, [1896] 1 Ch. 222; 65 L. J. Ch. 191.

(*m*) The words "commission" and "percentage" were probably intended to refer only to non-contentious business to which the Act originally applied: champertous agreements are expressly forbidden by s. 11; see also *Re Attorneys and Solicitors Act*, 1870, 1 Ch. D. 573; 45 L. J. Ch. 47.

cancel the agreement and order the costs to be taxed (*n*). No action can be brought upon any such agreement, but every question affecting its validity or effect may be decided, and the agreement may be enforced or set aside, by the Court on the application of any party to the agreement, or any person liable to pay, or entitled to be paid, the costs in respect of which the agreement is made (*o*). Any provision exempting a solicitor from liability for negligence or from any responsibility to which he would otherwise be subject is void (*p*). Except as provided by the Act, a bill under such an agreement is not subject to taxation, nor to the provisions of s. 37 of the Solicitors Act, 1843 (*q*).

Special agreements relating to non-contentious business are governed by s. 8 of the Solicitors Remuneration Act, 1881. The agreement must be in writing signed by the person to be bound thereby or by his agent; it may provide for the remuneration of the solicitor by a gross sum, or by commission, percentage, salary, or otherwise; it may be sued on, impeached, and set aside in the same manner and on the same grounds as an agreement not relating to the remuneration of a solicitor; and if, under any order for taxation, the client objects to it as unfair or unreasonable, the taxing master may enquire into the facts and certify the same to the Court, which may cancel the agreement or reduce the amount payable. A solicitor could always take a security from his client for costs already incurred, and he can now also do so for costs to be incurred (*r*).

Medical Practitioners.—Qualified medical practitioners were, from an early date, of three classes—physicians, surgeons, and apothecaries—who were governed by various different charters and statutes (*s*). Their rights are now governed by the Medical Acts, 1858 to 1886 (*t*), and (in England) by the Apothecaries Acts, 1815 and 1874 (*u*).

(*n*) S. 4.
(*o*) Ss. 8, 9.
(*p*) S. 7.
(*q*) S. 15.
(*r*) Attorneys and Solicitors Act, 1870, s. 16, as to litigious business, and Solicitors Remuneration Act, 1881, s. 5, and General Order thereunder of 1882, as to conveyancing business.
(*s*) See the Encyclopædia of the Laws of England, tit. Medical Practitioner.
(*t*) 21 & 22 Vict. c. 90; 23 Vict. c. 7; 39 & 40 Vict. c. 40, c. 41; 49 & 50 Vict. c. 48.
(*u*) 55 Geo. 3, c. 194; 37 & 38 Vict. c. 34.

By the *Medical Act*, 1858, a General Council of Medical Education and Registration was established, whose duty it was to keep a register of persons legally qualified to practise medicine. Under this Act, various diplomas might be granted entitling their holders to practise in some one or more branches, *e.g.*, as apothecaries or surgeons. But under s. 2 of the *Medical Act*, 1886, no person may be registered as a medical practitioner unless he has passed a qualifying examination in medicine, surgery, and midwifery.

Before the Act of 1858 the services of a physician, but not of a surgeon or apothecary, were presumed to be honorary, but this presumption might be rebutted by proof of an express contract to pay for his services. Now, under s. 6 of the *Medical Act*, 1886, which re-enacts a similar provision of the Act of 1858, every registered medical practitioner (*x*) can recover by action his expenses, charges, and fees, unless he is prohibited by the by-laws of any college of physicians of which he is a fellow.

An *apothecary* is one who advises, prescribes, and dispenses medicines. He cannot recover any charges for so doing, unless at the time of rendering his services (*y*) he had a certificate under the *Apothecaries Act*, 1815 (*z*).

Chemists.—Anyone may sell drugs, other than drugs containing poisons, unless he describes himself as a chemist or druggist, or by a similar description. In order to have the right so to describe himself, or to sell or keep an open shop for retailing, dispensing, or compounding poisons, he must be registered as a pharmaceutical chemist or as a chemist and druggist under the *Pharmacy Acts*, 1852 and 1868 (*a*). A chemist may also prepare and dispense drugs; but if he advises or prescribes drugs, he is subject to a penalty under s. 20 of the Apothecaries Act, 1815 (*b*).

Dentists.—By the *Dentists Acts*, 1921 and 1923, it is provided

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(*x*) He must be registered at the time of rendering his services (*Leman* v. *Houseley*, L. R. 10 Q. B. 66; 44 L. J. Q. B. 22).

(*y*) *Leman* v. *Houseley* (*ubi supra*).

(*z*) *Id.*, s. 21.

(*a*) 15 & 16 Vict. c. 56; 31 & 32 Vict. c. 121. See the Encyclopædia of the Laws of England, tit. Chemist.

(*b*) *Apothecaries Co.* v. *Greenough*, 1 Q. B. 800; 11 L. J. Q. B. 156; 55 R. R. 429; *Apothecaries Co.* v. *Jones*, [1893] 1 Q. B. 89; 65 L. T. 667.

that no one, unless registered under the Dentists Act, 1878, shall practise or hold himself out, whether directly or by implication, as practising or as being prepared to practise dentistry, and that any person so doing shall, in respect of each offence, be liable on summary conviction to a fine not exceeding £100. The Act does not, however, apply (i) to the practise of dentistry by a registered medical practitioner; or (ii) to extractions of teeth without anæsthetic by a registered pharmaceutical chemist, or chemist and druggist, where no registered medical practitioner or dentist is available; or (iii) to the performance in any public service of minor dental work under the supervision of a registered dentist and subject to conditions prescribed by the Act (*c*).

It has been held that the Act of 1878 does not prevent an unregistered person recovering the price of material supplied, such as gold or false teeth, as distinct from a fee for any dental operation or advice (*d*).

Veterinary Surgeons.—With regard also to veterinary surgeons, it is provided by the *Veterinary Surgeons Act*, 1881 (*e*), that they must be duly registered; and any person practising as a veterinary surgeon after December 31, 1883, without being on the register, is liable to a fine not exceeding £20, and is not entitled to recover any fee or charge for practising (*f*).

(*c*) 11 & 12 Geo. 5, c. 21, s. 1.

(*d*) *Hannan* v. *Duckworth*, 90 L. T. 546; *Seymour* v. *Pickett*, [1905] 1 K. B. 715; 74 L. J. K. B. 913; 92 L. T. 519.

(*e*) 44 & 45 Vict. c. 62. See also the Veterinary Surgeons Act (Amendment Act, 1920), 10 & 11 Geo. 5, c. 20.

(*f*) 44 & 45 Vict. c. 62, s. 17.

CHAPTER VI.

ASSIGNMENT AND DISCHARGE OF CONTRACT—REMEDIES FOR BREACH OF CONTRACT—DISCHARGE OF RIGHTS OF ACTION ARISING FROM BREACH.

SECTION 1.—*Assignment of Contract.*

As a general rule, a contract cannot impose liabilities (*a*) or confer rights (*b*) upon a third person who is not a party to it. In certain circumstances, however, a third party may take the place of the original contractor.

Assignment of liabilities.—The burden of a contract, *i.e.*, the obligation to perform it, cannot be *assigned*. If, however, its performance requires no special skill and contains no personal element, the promisee cannot object to its being performed by a sub-contractor of the promisor, who alone, nevertheless, can sue or be sued (*c*); but if the promisor was selected " with reference to his individual skill, competency, or other qualification," so that his personal performance is of the essence of the contract, he cannot delegate performance to a third party without the consent of the promisee, who, on the unwillingness or disability of the promisor to execute the work personally, may treat the contract as at an end (*d*).

The burden of a contract may, however, be transferred by *novation* (*e*), *i.e.*, by a new agreement. It may also pass by *operation of law*, on the death of the promisor, to his personal

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(*a*) *Schmaling* v. *Tomlinson*, 6 Taunt. 147.

(*b*) *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] A. C., at p. 885; 84 L. J. K. B. 1680; 113 L. T. 386; 31 T. L. R. 399.

(*c*) *British Waggon Co.* v. *Lea*, 5 Q. B. D. 149; 49 L. J. Q. B. 321; 42 L. T. 437.

(*d*) *Id.*; *Robson* v. *Drummond*, 2 B. & Ad. 303; 9 L. J. K. B. 187; 36 R. R. 569; and see *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K. B., at pp. 668, 669; [1903] A. C. 414; 72 L. J. K. B. 834; 89 L. T. 196; 19 T. L. R. 677.

(*e*) *Post*, p. 169.

representatives (*f*), and on his bankruptcy to the trustee in bankruptcy (*g*). So also, when land is leased, the burden of a covenant made by the lessor or lessee may run with the reversion or the lease; and in certain cases, the burden of a restrictive covenant may be enforced in Equity against an assignee of land (*h*).

Assignment of rights.—The benefit of a contract, *i.e.*, the right to enforce it, may be transferred by novation, but, unlike the burden of a contract, it is also capable of assignment, being a *chose in action*.

Equity as a general rule recognised the assignment of a chose in action, and permitted the assignee to sue in his own name; if, however, the right was purely legal, the assignor must be joined either as co-plaintiff or co-defendant in order to prevent him from subsequently suing at law in his own name (*i*). In the Common Law Courts, on the other hand, the assignment of a chose in action was not, as a rule, recognised; and the only remedy of the assignee was to sue in the name of the assignor, whom, however, Equity, by means of an injunction, would compel to allow the use of his name if he had entered into a binding contract to do so or if the assignment was for valuable consideration (*k*).

(*f*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 810. This does not apply to personal contracts (*id.*, and see *Hall* v. *Wright*, E. B. & E., at p. 793; 29 L. J. Q. B. 43; 113 R. R. 874).

(*g*) Bankruptcy Act, 1914, s. 30. The trustee may, however, disclaim an unprofitable contract: s. 54 (1).

(*h*) See Wilshere's Equity, Chapter XIV.

(*i*) *Durham Brothers* v. *Robertson*, [1898] 1 Q. B., at p. 769; 67 L. J. Q. B. 484; 48 L. T. 438. But if the assignment was of a purely equitable right he might sue alone (*Fulham* v. *McCarthy*, 1 H. L. C., at pp. 717, 718).

(*k*) Bullen and Leake's Pleadings (3rd ed.), p. 75 (*Tolhurst* v. *Associated, etc., Manufacturers* (*ubi supra*); *Re Westerton*, [1919] 2 Ch., at p. 111; 88 L. J. Ch. 392; *Ellis* v. *Torrington*, [1920] 1 K. B., at p. 406; 89 L. J. K. B. 369; 122 L. T. 361; 36 T. L. R. 22). See also *Performing Right Society* v. *London Theatre of Varieties*, [1924] A. C., at p. 14; 93 L. J. K. B. 33; 130 L. T. 450; 40 T. L. R. 52. The term "chose in action" is merely the antithesis to chose in possession, all personal property being either a mere right, such as the right to payment of a debt, or a physical object which is capable of possession: the expression is not, however, limited to rights under a contract; it includes "all personal rights of property which can only be claimed or enforced by action and not by taking physical possession" (*Torkington* v. *Magee*, [1902] 2 K. B., at p. 430; 72 L. J. K. B. 336; 88 L. T. 443; 19 T. L. R. 331); and see *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A. C., at p. 289; 87 L. J. K. B. 531; 118 L. T. 181; 34 T. L. R. 208. A chose in action is legal if, before the Judicature Act, 1873, the right could be enforced in a Court of Law; it is equitable or a "chose in equity" if it was a right

Before 1873 the only exceptions to the Common Law rule were:—

i. Assignments by or to the Crown of liquidated choses in action (*l*).

ii. Assignments permitted by statute, *e.g.*, of bills of lading (*m*) and policies of life (*n*) or marine (*o*) insurance and patents and copyright (*p*).

iii. Assignments recognised by the law merchant, *e.g.*, by negotiable instruments (*q*).

iv. Assignments by operation of law, as on death (*r*) or bankruptcy (*s*), or in case of covenants running with land (*t*).

Now, however, by s. 136 of the *Law of Property Act*, 1925 (re-enacting in substance s. 25 (6) of the Judicature Act, 1873), "Any absolute assignment by writing under the hand of the

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recognised only in Equity. The difference between the views of the Common Law and of Equity with regard to debts and damages, which were the earliest forms of choses in action, was that the Common Law regarded their assignment as merely the assignment of a personal right to bring an action, while Courts of Equity treated them as property, and in some respects considered their assignment as equivalent to the creation of a trust in favour of the assignee (see *Gorringe* v. *Irwell, etc., Works*, 34 Ch. D., at p. 135; 56 L. J. Ch. 85; 55 L. T. 572). But even in Equity a chose in action could be assigned only when it was incidental to a right in property, not when it was a bare right of action (*Ellis* v. *Torrington, ubi supra*).

(*l*) *Lambert* v. *Taylor*, 4 B. & C. 138; 3 L. J. K. B. 160; *Myles* v. *Williams*, 1 Gilb. 321; and see Pollock's Contracts, Appendix F.

(*m*) Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1.

(*n*) Policies of Assurance Act, 1867 (30 & 31 Vict. c. 114), ss. 3 and 5.

(*o*) Marine Insurance Act, 1868 (31 & 32 Vict. c. 86); see now the Marine Insurance Act, 1906, *post*, Part II., Chapter II. For the full list of assignments permitted by statute, see The Encyclopædia of the Laws of England, Vol. I., p. 556.

(*p*) *Post*, Part III., Chapter II.

(*q*) *Post*, Part II., Chapter V.

(*r*) This also does not apply to personal contracts, though the personal representatives may sue in respect of any right of action vested in the deceased, as, *e.g.*, to recover any money earned by the deceased and accrued due in his lifetime (*Stubbs* v. *Holywell Railway Co.*, L. R. 2 Ex. 311; 39 L. J. Ex. 166).

(*s*) See now the Bankruptcy Act, 1914, s. 48. This again does not apply to personal contracts (*Gibson* v. *Carruthers*, 8 M. & W., at p. 333). But, if the bankrupt sues for damages for breach of such a contract committed after the bankruptcy, the trustee can claim the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance (*Bailey* v. *Thurston & Co., Ltd.*, [1903] 1 K. B. 137; 72 L. J. K. B. 36; 88 L. T. 43). Rights of action for a breach of contract committed *before* bankruptcy pass to the trustee except where the breach results merely in injury to the person or feelings of the bankrupt (*Beckham* v. *Drake*, 2 H. L. C. 579; 12 L. J. Ex. 486).

(*t*) *Post*, Part II., Chapter VI.

assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice (a) the legal right to such debt or thing in action; (b) all legal and other remedies for the same; (c) the power to give a good discharge for the same, without the concurrence of the assignor: Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice (a) that the assignment is disputed by the assignor or any person claiming under him; or (b) of any other opposing or conflicting claims to such debt or thing in action, he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into Court under the provisions of the Trustee Act, 1925."

To satisfy this section:—

1. The assignment must be *absolute* and must *not* purport to be *by way of charge only*. If an assignment unconditionally passes to the assignee the whole right of the assignor, the mere fact that it is by mortgage or otherwise by way of security, so that the assignor may have an express or implied equity to redeem, does not prevent it from being absolute (*u*). But an assignment which is conditional (*v*), or which is an assignment of such part of the fund as shall be sufficient to pay a debt, and so is merely by way of charge, is not within the section (*w*).

An assignment of *part* of a debt or chose in action is not within the section (*x*).

2. *The assignment must be in writing under the hand of the assignor.*

3. It must be of a *debt or legal chose in action*. The section

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(*u*) *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190; 71 L. J. K. B. 630; 86 L. T. 794; 18 T. L. R. 654, reviewing earlier authorities.

(*v*) *Durham Brothers* v. *Robertson* (*ubi supra*).

(*w*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10; 71 L. J. K. B. 23.

(*x*) See *Durham Brothers* v. *Robertson* (*ubi supra*); *Forster* v. *Baker*, [1910] 2 K. B. 636; 79 L. J. K. B. 664; 102 L. T. 29; *Re Steel Wing Co.*, [1921] 1 Ch. 349; 90 L. J. Ch. 116. But it may be the subject of an equitable assignment (*post*, p. 167).

applies to all assignable choses in action, whether choses in law or choses in equity, but it does not make assignable any chose in action which was not previously assignable either at law or in Equity (*y*). It does not, therefore, make valid an assignment which is invalid at Common Law, *e.g.*, the assignment of a pension (*z*). Nor does it make possible the assignment of the benefit of a contract involving special personal qualifications on the part of the promisee if there are still obligations enforceable against him (*a*), nor of the benefit of a contract made with a view to the personal requirements of the promisee (*b*). A right of action in *tort* is not assignable at law or in Equity (*c*), but the damages which may be recovered in a pending action are assignable (*d*).

4. *Notice in writing must be given.* Under the Act notice is necessary in order to transfer the legal rights and powers to the assignee, not merely, as in the case of equitable assignments, in order to preserve his priority over subsequent assignees. It may be given at any time before action (*e*), either by the assignor or assignee, and even after the death of either (*f*).

5. *The assignment is subject to equities* (*g*).

Valuable consideration is not necessary for an assignment under this section (*h*).

(*y*) *Re Pain*, [1919] 1 Ch. 38; 119 L. T. 647; 87 L. J. Ch. 550; *Tolhurst* v. *Associated, etc., Manufacturers*, [1902] 2 K. B., at p. 676; [1903] A. C., at p. 424; 72 L. J. K. B. 834.

(*z*) *Ante*, p. 105.

(*a*) *Tolhurst* v. *Associated, etc., Manufacturers* (*ubi supra*).

(*b*) *Kemp* v. *Baerselman*, [1906] 2 K. B. 604; 75 L. J. K. B. 873. (A contracted to supply to B, a confectioner, all the eggs required by him for manufacturing purposes for one year. B assigned his business to a company with a larger business and greater requirements. *Held*, that the benefit of the contract was not assignable by B to the company.) An option to purchase contained in a hire-purchase agreement is assignable (*Whiteley, Ltd.* v. *Hilt*, [1918] 2 K. B. 808; 87 L. J. K. B. 1058; 34 T. L. R. 592).

(*c*) *Defries* v. *Milne*, [1913] 1 Ch. 98; 82 L. J. Ch. 1; 107 L. T. 593.

(*d*) *Glegg* v. *Bromley*, [1912] 3 K. B. 474; 81 L. J. K. B. 108; 106 L. T. 825. And a right of action for unliquidated damages for breach of contract can be assigned as part of the assets of a business (*Ogdens, Ltd.* v. *Weinberg*, 95 L. T. 567; 22 T. L. R. 729; compare note (*k*), *ante*, p. 163).

(*e*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530; 73 L. J. K. B. 782; 91 L. T. 331; 20 T. L. R. 628.

(*f*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D., at p. 538; 53 L. J. Q. B. 280.

(*g*) *Post*, p. 168.

(*h*) *Harding* v. *Harding*, 17 Q. B. D., at p. 44; 55 L. J. Q. B. 462; *Re Westerton*, [1919] 2 Ch. 104; 88 L. J. Ch. 392.

It is still possible, independently of s. 136 of the Law of Property Act, 1925, to make a valid *equitable* assignment of a chose in action, and an assignment which for want of notice or otherwise does not come within the provisions of that Act may be enforceable as an equitable assignment. But in such cases the assignee has not the legal rights or remedies of the assignor, and in any proceedings for the recovery of the chose in action the former practice of the Courts of Equity as to making the assignor a co-plaintiff or co-defendant must still be followed (*i*).

No consideration is necessary to constitute a valid equitable assignment, provided that the assignor "did everything which, according to the nature of the property comprised in the assignment, was necessary to be done in order to transfer the property and render the assignment binding upon him" (*k*). Nor is the title of the assignee incomplete as against the assignor merely because he has not given notice to the debtor or person from whom the assignor would have been entitled to receive the fund, though, if the assignee fails to give notice, he may be postponed to a subsequent assignee who gives notice first (*l*). Nor is any particular form necessary for an equitable assignment so long

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(*i*) *Tolhurst* v. *Associated Portland Cement Manufacturers* (*ubi supra*); *Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C., at p. 462; 74 L. J. K. B. 893; 93 L. T. 495; 20 T. L. R. 195.

(*k*) *Per* Warrington, L.J., in *Re Williams*, [1917] 1 Ch., at p. 8; 83 L. J. Ch. 36; 115 L. T. 689, following the rule laid down by Turner, L.J., in *Milroy* v. *Lord*, 4 De G. F. & J., at p. 274; 31 L. J. Ch. 798; 135 R. R. 135, for the creation of voluntary *trusts*; see *ante*, p. 153, note (*k*). See also *Re Griffin*, [1899] 1 Ch. 408; 68 L. J. Ch. 220; 79 L. T. 442; 15 T. L. R. 78. But a mere agreement to assign a chose in action is not enforceable, unless made for valuable consideration (*Re Earl of Lucan*, 45 Ch. D. 470; 60 L. J. Ch. 40; 63 L. T. 538). An assignment of a future chose in action, *e.g.*, future book debts, operates in Equity as an agreement to assign, and if supported by valuable consideration constitutes a trust or creates a charge which binds the fund as soon as the contract is capable of performance (*Tailby* v. *Official Receiver*, 13 A. C., at pp. 543, 546; 58 L. J. Q. B. 75; 60 L. T. 162; *Re Ellenborough*, [1903] 1 Ch. 697; 72 L. J. Ch. 218; 87 L. T. 714).

(*l*) *Gorringe* v. *Irwell, etc., Works* (*ubi supra*); *Re Griffin* (*ubi supra*). This is in accordance with the equitable rule, known as the rule in *Dearle* v. *Hall*, 27 R. R. 1; 3 Russ. 1, by which, as between successive assignees of equitable interests in personalty, priority is obtained by the first who gives notice to the trustee or legal owner of the fund (see Wilshere's Equity, Chapter I.). By s. 137 of the Law of Property Act, 1925, this rule is made applicable to dealings with equitable interests in land, capital money and securities representing capital money effected after the commencement of the Act. But (i) the section does not apply until a trust has been created, and (ii) notice to a trustee will not affect priorities unless it is in writing, whether the property be real or personal.

as it appears plain that the benefit of the chose in action is intended to be transferred to the assignee (*m*). Thus an equitable assignment is constituted by an order given by A to B upon C, directing C, who owes money to A, to pay the whole or a part of that money to B (*n*).

An equitable assignment is subject to equities; that is to say, in accordance with the equitable rule governing assignments of equitable interests, the assignee can get no more than the assignor has to give (*o*), and therefore takes subject to all defects in the title of the assignor and to all rights of set-off and all defences which the debtor could have set up against the assignor (*p*).

It should be noticed that, by the *Bankruptcy Act*, 1914, it is provided that any general assignment of existing or future book debts made on or after April 1, 1914, by a person engaged in any trade or business, is to be avoided in the event of bankruptcy unless registered as an absolute bill of sale. But this does not apply to any assignment of specific debts or of book debts included in a transfer of a business made *bona fide* and for value (*q*).

Section 2.—*Discharge of Contract and of Rights arising from Breach of Contract.*

1. **Discharge by agreement.**—Obligations created by a contract or by a breach of contract may be discharged by a subsequent contract under seal or for valuable consideration.

(*m*) *Re Griffin* (*ubi supra*); *Durham Brothers* v. *Robertson* (*ubi supra*); *Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (*ubi supra*); *Re Williams* (*ubi supra*).

(*n*) *Rodick* v. *Gandell*, 1 De G. M. & G., at p. 777; 91 R. R. 282. But an equitable assignment is not constituted by a mere revocable authority given by A to his own agent to pay money to B (*ibid.*), or given by A to B and authorising him to receive money (*Re Williams* (*ubi supra*)). See Wilshere's Equity, Chapter IX., s. 1. And there cannot be an equitable assignment except of a specific fund owed by C to A (*Percival* v. *Dunn*, 29 Ch. D. 128; 54 L. J. Ch. 570; 52 L. T. 320; *Western Wagon, etc., Co.* v. *West*, [1892] 1 Ch. 271; 61 L. J. Ch. 244; 66 L. T. 402).

(*o*) *Phillips* v. *Phillips*, 4 De G. F. & J., at p. 215; 31 L. J. Ch. 321; 135 R. R. 97.

(*p*) See *Stoddart* v. *Union Trust, Ltd.*, [1912] 1 K. B. 181; 81 L. J. K. B. 140. But a debtor may contract with his creditor that he will not, as against a transferee, set up any rights which he might have set up against the creditor (*Re Goy & Co.*, [1900] 2 Ch., at p. 154; 69 L. J. Ch. 481; 83 L. T. 309; 16 T. L. R. 310). Thus debentures usually contain a provision that they shall be assignable free from equities.

(*q*) 4 & 5 Geo. 5, c. 59, s. 43.

If a contract is still executory, so that rights and obligations exist on both sides, it may before breach be discharged by simple waiver in any form, the consideration being the relinquishment by each party of his rights (*r*). But the discharge of a contract which has been executed by one party, or the discharge of rights of action arising from breach of contract, can be effected only by release under seal or for a new consideration (*s*).

The new consideration for the discharge of a contract may take the form of a new contract. Here there is a *novation*, which means this: "that, there being a contract in existence, some new contract is substituted for it, *either between the same parties or between different parties*, the consideration mutually being the discharge of the old contract" (*t*). A novation by change of parties requires a threefold agreement between the existing parties and the new party. Common examples occur where a new partner is introduced into a firm (*u*), or where a debtor makes a composition with his creditors (*x*). A mere voluntary forbearance by one party to insist upon strict performance by the other party does not constitute a fresh contract discharging the existing contract (*y*).

Form of discharge.—If the original contract was a simple contract, it could always be discharged in any form if the discharge was for valuable consideration. If it was by deed, it could not at Common Law be discharged otherwise than by deed. In Equity, however, a contract under seal might be discharged by a new agreement made for valuable consideration; and since the Judicature Act, 1873, the equitable rule prevails in all Courts (*z*).

(*r*) *Foster* v. *Dawber*, 6 Ex. 839; 20 L. J. Ex. 385; 86 R. R. 506.

(*s*) See *Atlantic Shipping, etc., Co.* v. *Dreyfus & Co.*, [1922] 2 A. C., at pp. 261, 262; 91 L. J. K. B. 513; 127 L. T. 411; 38 T. L. R. 534. This does not apply to negotiable instruments (Bills of Exchange Act, 1882, s. 62, *post*, Part II., Chapter V).

(*t*) *Scarfe* v. *Jardine*, 7 A. C., at p. 351; 51 L. J. Q. B. 612; 47 L. T. 258. See also *Thornhill* v. *Neats*, 8 C. B. (N.S.) 831; 2 L. T. 539; 125 R. R. 902 (novation by change of terms).

(*u*) See *Rolfe* v. *Flower*, L. R. 1 P. C. 27; 35 L. J. P. C. 13; 146 R. R. 96; and *post*, Part II., Chapter I.

(*x*) *Post*, p. 176.

(*y*) See *Hickman* v. *Haynes*, L. R. 10 C. P. 598; 49 L. J. C. P. 358; 32 L. T. 873 (reviewing earlier authorities); *Levey & Co.* v. *Goldberg*, [1922] 1 K. B. 688; 91 L. J. K. B. 349; 127 L. T. 68; 38 T. L. R. 421.

(*z*) *Steeds* v. *Steeds*, 22 Q. B. D. 537; 58 L. J. Q. B. 302; and see *Nash* v. *Armstrong*, 10 C. B. (N.S.) 259; 30 L. J. C. P. 286.

Where, however, the original contract was one for which writing was necessary, it cannot be *varied*, although it may be wholly rescinded, by an agreement which is in itself unenforceable for want of writing (*a*). A debt of record may be discharged by a release under seal (*b*), or by accord and satisfaction. An unconditional covenant not to sue has the same effect as a release (*c*).

Discharge may also take place *under an express or implied term of the original contract.* Parties to a contract may agree that the contract shall not become operative, or that some particular right or obligation shall not come into existence, until the happening of some particular event, either within or without the control of either of them, as, for instance, that the contract shall not be binding until some third person has approved of its terms, or that no payments shall be made under it until certain accounts have been taken. In such case the approval is a *condition precedent* to the existence of the contract, and the taking of the accounts is a *condition precedent* to the accrual of the right or obligation to demand or make any payment. On the other hand, parties may agree that the contract shall be discharged on the happening of a certain event, as, *e.g.*, on the outbreak of a European war within a given time. The outbreak of such a war is then a *condition subsequent*, the occurrence of which makes the contract void (*d*). So also it may be an implied term of a contract that it shall be discharged by a given event. Thus in every contract of service there is, in the absence of any express agreement to the contrary, an implied term that it may be determined by reasonable notice (*e*).

(*a*) *Goss* v. *Nugent*, 5 B. & Ad., at p. 65; 2 L. J. K. B. 127; 39 R. R. 392; *Morris* v. *Baron & Co.*, [1918] A. C. 1; 87 L. J. K. B. 147; 118 L. T. 34; *British and Benington's, Ltd.* v. *N. W. Cachar Tea Co.*, [1923] A. C. 48; 92 L. J. K. B. 62; 128 L. T. 422.

(*b*) *Barker* v. *St. Quintin*, 12 M. & W. 441; 13 L. J. Ex. 144.

(*c*) *Newington* v. *Levy*, L. R. 6 C. P., at p. 191; 40 L. J. C. P. 29; 23 L. T. 594; and see *Ford* v. *Beech*, 11 Q. B. 852; 17 L. J. Q. B. 114.

(*d*) See *New Zealand Shipping Co.* v. *Société des Ateliers de France*, [1919] A. C. 1; 87 L. J. K. B. 746. But if the event is one which either party can by his own act or omission bring about, the stipulation cannot be insisted upon *by* a party who has wrongfully brought it about (*id.*, at pp. 12, 13). Both conditions precedent and conditions subsequent are sometimes termed *casual* conditions, and must be distinguished from *promissory* conditions, the non-fulfilment of which discharges a contract (*post*, p. 186).

(*e*) *Post*, Part II., Chapter I.

Where a contract consists of mutual promises, each forming the consideration of the other, they usually constitute *concurrent conditions*. Such conditions form a sub-division of conditions precedent, since neither party can maintain an action without proving that he was ready and willing to perform his own promise (*f*). It is, however, possible for one person, on consideration of a promise made by another, to make an independent or absolute promise, so that he is bound to perform it whether or not the promise made to him by the other party is performed.

Obligations created by breach of contract may also be discharged either by release under seal (*g*) or by *accord and satisfaction*, *i.e.*, by something which by a new agreement (accord) the creditor accepts in satisfaction. Before breach a contract can, as has just been stated, be discharged by a new executory agreement, *i.e.*, by accord alone; but after breach "an accord without satisfaction has no legal effect, and the cause of action is not discharged so long as the satisfaction agreed upon remains executory. . . ." If, however, it can be shown that what a creditor accepts in satisfaction is merely his debtor's *promise*, and not the performance of that promise, the original cause of action is discharged from the date when the promise is made (*h*).

Joint creditors or debtors.—A release by one of several joint creditors operates as a release by all (*i*), but a covenant by one of several joint creditors not to sue is no bar to an action brought by such creditors jointly (*k*). A release of one of several persons who are jointly or jointly and severally liable operates as a release of all, unless the creditor expressly reserves his right against the others (*l*); but a mere covenant not to sue one of several joint debtors does not release the others (*m*).

(*f*) See s. 28 of the Sale of Goods Act, 1893, *post*, Part II., Chapter IV.

(*g*) *Goldham* v. *Edwards*, 17 C. B. 141; 104 R. R. 632.

(*h*) *Morris* v. *Baron & Co.*, [1918] A. C., at p. 35; 87 L. J. K. B. 145; 118 L. T. 34. See also *Elton, etc., Co.* v. *Broadbent*, 89 L. J. K. B. 186.

(*i*) *Jones* v. *Herbert*, 7 Taunt. 421; 18 R. R. 520; *Wilkinson* v. *Lindo*, 7 M. & W. 81; 10 L. J. Ex. 94; 56 R. R. 638.

(*k*) *Walmesley* v. *Cooper*, 11 Ad. & E. 216; 10 L. J. Q. B. 49.

(*l*) *North* v. *Wakefield*, 13 Q. B. 536; 18 L. J. Q. B. 214.

(*m*) *Hutton* v. *Eyre*, 6 Taunt. 289; 16 R. R. 619; *Willis* v. *De Castro*, 4 C. B. (N.S.) 216; 27 L. J. C. P. 243. A release by which the creditor reserves his rights against co-debtors amounts merely to a covenant not to sue (*id.*).

Discharge by operation of law takes place in four cases:—

i. Where the contract, without any change of terms or parties, is merged into another contract of a higher nature (*n*).

ii. Where the rights and liabilities become vested in the same person (*o*).

iii. Where, otherwise than by accident or mistake, a material alteration to a written instrument is made by the plaintiff, or by a person for whom he is responsible and for his benefit, without the consent of the other party (*p*).

iv. By an order of discharge in bankruptcy, as regards liabilities provable in the bankruptcy (*q*).

Discharge by impossibility of performance.—If parties contract to do something which at the time of the contract is *absolutely* incapable of performance, the contract is void *ab initio* (*r*). Where, however, a person enters into a positive contract to do something which is not absolutely impossible or illegal, he must perform it or pay damages for not doing so, although in consequence of unforeseen accidents the performance has become unexpectedly burdensome or even impossible; but this rule is only applicable when the contract is positive and absolute, and not subject to any express or implied condition to the contrary (*s*). And wherever performance of a contract has become impossible by a supervening cause beyond the control of either party, and

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(*n*) *Ante*, pp. 21, 27.

(*o*) See, *e.g.*, s. 61 of the Bills of Exchange Act, 1882, *post*, Part II., Chapter V.

(*p*) See Bullen & Leake's Pleadings (3rd ed.), p. 485, and cases there cited. See also *Pattinson* v. *Luckley*, L. R. 10 Ex. 330; 44 L. J. Ex. 180; 33 L. T. 360; *Suffell* v. *Bank of England*, 9 Q. B. D. 555; 51 L. J. Q. B. 401; 47 L. T. 146; and s. 64 of the Bills of Exchange Act, 1882, *post*, Part II., Chapter V.

(*q*) Bankruptcy Act, 1914, s. 28 (2). Certain liabilities are, however, excepted by s. 28 (1).

(*r*) As, *e.g.*, a contract to sell goods which have perished (see s. 6 of the Sale of Goods Act, 1893, *post*, Part II., Chapter IV.), or a contract where "the thing stipulated for was, according to the state of knowledge of the day, so absurd that the parties could not be supposed to have contracted" (*Clifford* v. *Watts*, L. R. 5 C. P., at p. 588; 40 L. J. C. P. 36; 22 L. T. 717).

(*s*) *Taylor* v. *Caldwell*, 1 B. & S., at p. 833; 32 L. J. Q. B. 164; 8 L. T. 356; *Horlock* v. *Beal*, [1916] 1 A. C., at pp. 519, 520; 85 L. J. K. B. 602; 114 L. T. 193; 32 T. L. R. 251; *Wills & Sons, Ltd.* v. *Cunningham, Sons & Co.*, [1924] 2 K. B. 220; 93 L. J. K. B. 1008; 131 L. T. 400; 40 T. L. R. 108.

not within the contemplation of the parties at the time of making the contract nor provided for by any express term of the contract, *and* from the nature of the contract it appears that the parties from the first must have known that its fulfilment would become impossible if such a supervening cause occurred, both parties are by its occurrence excused from further performance, a condition, arising from the presumed intention of the parties, being implied that in such a case the contract shall come to an end (*t*). Such a condition will accordingly be implied where the event which makes the contract incapable of performance is:—

i. In a contract for personal services, the death or incapacity of the promisor (*u*).

ii. In a contract made on the basis of the continued existence of a specific thing, the destruction of that thing (*x*).

iii. In a contract made on the basis of the existence, continuance or occurrence of a certain state of affairs or event, the non-existence, cessation or non-occurrence of that event (*y*).

iv. A "vital change of circumstances" which renders the performance of the contract impossible, or delays it to

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(*t*) *Horlock* v. *Beal*, [1916] 1 A. C., at p. 525; 85 L. J. K. B. 602; *Tamplin S.S. Co., Ltd.* v. *Anglo-Mexican, etc., Co.*, [1916] 2 A. C., at pp. 403, 422; 85 L. J. K. B. 1589; 115 L. T. 315; 32 T. L. R. 677; *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A. C., at pp. 130, 131; 87 L. J. K. B. 370; 117 L. T. 766; 34 T. L. R. 113; *Bank Line, Ltd.* v. *Capel & Co.*, [1919] A. C. 435; 88 L. J. K. B. 211; 120 L. T. 129; 35 T. L. R. 150; *Comptoir Commercial Anversois* v. *Power & Co.*, [1920] 1 K. B. 868; 89 L. J. K. B. 849; 122 L. T. 567; 36 T. L. R. 101. In such cases the whole contract is brought to an end, including a submission to arbitration contained in it (*Hirji Mulji* v. *Cheong Yue S.S. Co.*, 95 L. J. P. C. 121; [1926] A. C. 497).

(*u*) *Taylor* v. *Caldwell* (*ubi supra*); *Robinson* v. *Davison*, L. R. 6 Ex. 172; 40 L. J. Ex. 172; 24 L. T. 755.

(*x*) *Taylor* v. *Caldwell* (*ubi supra*) (contract for the hire of a music-hall discharged upon its destruction by fire).

(*y*) *Krell* v. *Henry*, [1903] 2 K. B. 740; 72 L. J. K. B. 794; 89 L. T. 328; 19 T. L. R. 711 (contract to rent a flat for the purpose of viewing the Coronation procession of King Edward VII. discharged by the failure of the procession to take place); compare *Herne Bay S.S. Co., Ltd.* v. *Hutton*, [1903] 2 K. B. 683; 72 L. J. K. B. 879; 89 L. T. 422; 19 T. L. R. 680 (where, on the hire of a vessel for viewing a naval review and for a day's cruise round the fleet, it was held that the happening of the review was not the basis of the contract); *Blackburn Bobbin Co.* v. *Allen & Sons*, [1918] 2 K. B. 467; 87 L. J. K. B. 1085; 119 L. T. 215; 34 T. L. R. 508 (where it was held that the parties to a contract for the sale of timber had not contracted on the basis that a certain method of delivering the timber, which was prevented by the war, would continue possible).

such an extent as to frustrate its commercial object (*z*), as, for example, when performance is prevented or frustrated by British legislation (*a*) or Government intervention (*b*), or by illegality arising from a change in the law of a foreign country when that law governs the performance of the contract (*c*). The doctrine of frustration does not, however, apply to a lease which is more than a mere contract, because by it a term of years is created and vested in the lessee (*d*).

In these cases, except where the contract can be regarded as rescinded *ab initio*, the contract is discharged only from the time when it is ascertained that performance is impossible; and any payment previously made, and any legal right that has previously accrued, will not be disturbed (*e*). Apart from any of the above causes, a contract is also discharged by impossibility of performance arising through its execution being prohibited by subsequent legislation (*f*) or becoming illegal by subsequent events, *e.g.*, by the outbreak of war (*g*).

(*z*) See *Horlock* v. *Beal* (*ubi supra*) (contract by a seaman to serve on a ship discharged by its detention at Hamburg).

(*a*) *Baily* v. *De Crespigny*, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; 19 L. T. 681 (covenant by A and his assigns not to build on land discharged by sale to a railway company under the compulsory powers given to them by statute).

(*b*) *Metropolitan Water Board* v. *Dick, Kerr & Co.* (*ubi supra*) (contract to construct a reservoir discharged upon continuance of the work being prohibited under the Defence of the Realm Acts and Regulations, the interruption being such that the contract, when resumed, would be of a different character); *Bank Line, Ltd.* v. *Capel & Co.*, [1919] A. C. 435; 88 L. J. K. B. 211; 120 L. T. 129; 35 T. L. R. 150 (contract to charter a ship discharged by its requisition by the Government and detention for so long a period as to frustrate the adventure); *Re Shipton, Anderson & Co. and Harrison Brothers*, [1915] 3 K. B. 676; 84 L. J. K. B. 1237; 31 T. L. R. 598 (contract for the sale of wheat discharged by its requisition by the Government).

(*c*) *Ralli Brothers* v. *Compania Naviera Sota y Aznar*, 89 L. J. K. B. 999; [1920] 2 K. B. 287; 123 L. T. 375; 36 T. L. R. 456.

(*d*) *Whitehall Court, Ltd.* v. *Ettlinger*, [1920] 1 K. B. 680; 89 L. J. K. B. 126; 122 L. T. 540; 36 T. L. R. 80; *Matthey* v. *Curling*, [1922] 2 A. C. 180; 91 L. J. K. B. 593; 127 L. T. 247; 38 T. L. R. 475.

(*e*) *Chandler* v. *Webster*, [1904] 1 K. B. 493; 73 L. J. K. B. 401; 90 L. T. 217; 20 T. L. R. 22; *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A. C., at p. 510; 95 L. J. P. C. 121. In the first case, where the facts were similar to those in *Krell* v. *Henry* (*ubi supra*), it was held that the lessee (i) could not recover a deposit which he had paid, and (ii) must make a further payment, which under the contract was due and payable before it was ascertained that the procession would not take place.

(*f*) *Metropolitan Water Board* v. *Dick, Kerr & Co.*, [1918] A. C., at p. 128.

(*g*) *Esposito* v. *Bowden*, 7 E. & B., at p. 779; 27 L. J. Q. B. 17; 110 R. R. 822; *ante*, p. 105.

Discharge by performance.—The question whether or not a contract has been performed depends in each case on its express or implied terms. Partial performance will be dealt with later; the only questions that will be considered here are Payment and Tender.

Payment.—An obligation to pay a sum of money is discharged by payment of the sum due, by the debtor or his agent, to the creditor, or to an agent of the creditor who has authority to receive it (*h*). Payment made voluntarily by a third person other than an agent does not discharge the debtor (*i*) unless subsequently ratified by him (*k*); but payment by a surety for the debtor in pursuance of his legal obligation discharges the debtor, and entitles the surety to stand in the place of the creditor (*l*). Payment does not necessarily require the transfer of money; it may be effected by a settlement of accounts (*m*).

Payment, in order to discharge the debtor, must be of the whole amount due; the mere payment of a smaller sum cannot of itself amount to a discharge (*n*). But a debtor may be discharged if, *by a new agreement* between himself and the creditor, the creditor accepts something *other than money* which amounts to a "new and different benefit" (*o*). Thus he may be discharged if the creditor, *in lieu of payment*, accepts a negotiable instrument (*p*). If, however, a debtor sends to his creditor a cheque

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(*h*) *Eyles* v. *Ellis*, 4 Bing. 112; 5 L. J. C. P. 110; *Catterall* v. *Hindle*, L. R. 2 C. P. 186; 35 L. J. C. P. 161; 148 R. R. 731. As to the authority of an agent, see *post*, Part II., Chapter I. Payment in an action to the plaintiff's solicitor is equivalent to payment to the plaintiff, but not payment to an agent or clerk of the solicitor, unless he has authority to receive it (*Yates* v. *Freckleton*, 2 Dougl. 623; *Perry* v. *Turner*, 1 L. J. Ex. 13).

(*i*) *James* v. *Isaacs*, 12 C. B. 791; 22 L. J. C. P. 73.

(*k*) *Belshaw* v. *Bush*, 11 C. B. 191; 22 L. J. C. P. 24; 87 R. R. 639; *Simpson* v. *Eggington*, 10 Ex. 845; 24 L. J. Ex. 312; 102 R. R. 867.

(*l*) *Post*, Part II., Chapter II.

(*m*) *Spargo's Case*, L. R. 8 Ch., at p. 414; 42 L. J. Ch. 488. See also *Eyles* v. *Ellis* (*ubi supra*), where the debtor and creditor banked at the same bank and payment was by a transference from the debtor's account to the creditor's account.

(*n*) *Pinnel's Case* (1602), 5 Rep. 112 a; affirmed with a review of all the intermediate authorities in *Foakes* v. *Beer*, 9 A. C. 605; 54 L. J. Q. B. 130; 51 L. T. 833.

(*o*) See *Bidder* v. *Bridges*, 37 Ch. D., at p. 417; 57 L. J. Ch. 300; 58 L. T. 656. Such an agreement, if made after the proper date of payment, operates, strictly speaking, as an "accord and satisfaction" (*ante*, p. 171).

(*p*) *Sibree* v. *Tripp*, 15 M. & W. 23; 15 L. J. Ex. 318; 71 R. R. 545; *Curlewis* v. *Clark*, 3 Ex. 375; 18 L. J. Ex. 114; *Bidder* v. *Bridges* (*ubi*

for a smaller sum than is due, stating that it is "in full of all demands," and the cheque is retained by the creditor, it is a question of *fact* as to the terms on which it is so kept; and if the creditor, though he keeps the cheque, intimates that he takes it merely on account, he can sue for the balance of the debt (*q*). But where a cheque for an amount smaller than the debt is sent by a *third person* in full settlement of the debt, and is retained by the creditor, he must be taken to have accepted the amount upon the terms upon which it is offered, and he cannot subsequently sue the debtor for the balance (*r*).

And since the Court will not enquire into the adequacy of the consideration for an agreement (*s*), the debtor may be discharged by an agreement under which the creditor, in whole or part satisfaction of the debt, accepts some chattel of less value, such as "a horse, hawk or robe," or under which he gets any additional advantage, however small, such as payment at an earlier day or at a different place (*t*); and payment of a sum smaller than a debt amounts to a discharge when made in compromise of a disputed liability (*u*).

A composition between a debtor and his creditors, whereby each creditor agrees to accept a proportionate part of his debt, is valid at Common Law, the debtor being discharged by the substitution of a new agreement, and the consideration to each creditor for that new agreement being, not merely the promise by the debtor to pay part of the debt, but also the forbearance of the other creditors, *who are parties to the agreement*, to insist upon their full claims (*x*).

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supra). See also *Goddard* v. *O'Brien*, 9 Q. B. D. 37, which was, however, questioned in *Hirachand Punamchand* v. *Temple* (*infra*).

(*q*) *Day* v. *McLea*, 22 Q. B. D. 610; 58 L. J. Q. B. 293; 60 L. T. 947; and see *Ackroyd* v. *Smithies*, 54 L. T. 130.

(*r*) *Hirachand Punamchand* v. *Temple*, [1911] 2 K. B. 330; 80 L. J. K. B. 1155; 105 L. T. 277. If a third person gives a consideration for the discharge of the debtor, it does not matter what proportion it bears to the amount of the debt ([1911] 2 K. B., at p. 340).

(*s*) *Ante*, p. 63.

(*t*) *Pinnel's Case* (*ubi supra*), cited in *Foakes* v. *Beer* (*ubi supra*).

(*u*) *Ante*, p. 66; and see *Cooper* v. *Parker*, 15 C. B. 822; 24 L. J. C. P. 68; 100 R. R. 586.

(*x*) *Good* v. *Cheesman*, 2 B. & Ad. 335; 9 L. J. K. B. 234; 36 R. R. 574; explained by *Slater* v. *Jones*, L. R. 8 Ex., at p. 193; 42 L. J. Ex. 122; 29 L. T. 56; see also *West Yorkshire, etc., Agency, Ltd.* v. *Coleridge*, [1911] 2 K. B. 326; 80 L. J. K. B. 1122; 105 L. T. 215. In other words, the

Mode and place of payment.—The ordinary Common Law rule is that a debtor must seek out his creditor and pay him at his residence or place of business (*y*) in legal tender (*z*). If payment is made in any other way, as, *e.g.*, through the post, the debtor is discharged only if the creditor has expressly requested payment to be made in that way, or such a request can be inferred (*a*). Request need not be in express terms, and may be inferred from the previous course of dealing between the parties, but not from the mere fact that the debtor has been in the habit of making payment in some particular way and the creditor has not dissented (*b*). In all cases, however, payment must be made in an ordinary and proper manner. Thus, in a modern case, A sent to B a written notice stating that a sum of £48, due from B to A, should be paid at A's office and asking B, "when remitting," to return the notice. B sent by registered post £48 in Treasury notes, which were stolen before they reached A. It was held (i) that the notice amounted to a request to send payment by post, but (ii) that to send so large a sum in Treasury notes was not an ordinary and reasonably proper way of making payment, and that B was not discharged (*c*).

Payment by negotiable instrument.—A negotiable instrument

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debtor, in lieu of payment in full, gives, in satisfaction of his debts, a partial payment plus a composition. See *Couldery* v. *Bartrum*, 19 Ch. D., at p. 400; 51 L. J. Ch. 265; 45 L. T. 689. Under the Bankruptcy Act, 1914, a debtor against whom a receiving order is made may, either before (s. 16) or after (s. 21) adjudication, submit a proposal for a composition which, if accepted by a majority in number and three-fourths in value of the creditors who have proved, and approved by the Court, is binding on all creditors whose debts are provable. Private arrangements with creditors are governed by the Deeds of Arrangement Act of 1914, and by the Rules of 1915, made under s. 28 of the latter Act, and must be registered within seven days of execution.

(*y*) *Rein* v. *Stein*, [1892] 1 Q. B., at p. 758; 61 L. J. Q. B. 401; 66 L. T. 469; *Drexel* v. *Drexel*, [1916] 1 Ch., at p. 260; 85 L. J. Ch. 235; 114 L. T. 350; 32 T. L. R. 208.

(*z*) See *Fowler* v. *Midland Electric Corporation, Ltd.*, [1917] 1 Ch. 656; 86 L. J. Ch. 472; 117 L. T. 97; 33 T. L. R. 322. This does not apply to a banker as against his customer (*Joachimson* v. *Swiss Bank*, [1921] 3 K. B. 110; 90 L. J. K. B. 973).

(*a*) See, *e.g.*, *Edmundson* v. *Mayor of Longton*, 19 T. L. R. 15 (consumer of gas discharged by placing money in an automatic gas meter).

(*b*) *Pennington* v. *Crossley*, 77 L. T. 43.

(*c*) *Mitchell Henry* v. *Norwich Union Society*, [1918] 2 K. B. 67; 87 L. J. K. B. 695; 119 L. T. 111; 34 T. L. R. 359.

given as payment of a debt, may be accepted in satisfaction and as a discharge of a debt (*d*), but is *prima facie* only a conditional payment, the condition being that the debt revives if the instrument is not duly met at the proper date (*e*). During the currency of the instrument, the remedies of the creditor in respect of the debt are suspended (*f*), but if it is not duly met they revive unless it is outstanding in the hands of a third party (*g*). When the condition is performed by actual payment, the payment relates back to the date when the instrument was given (*h*).

Payment may in some cases be inferred or presumed. Thus it may be inferred from mere lapse of time (*i*), and, in the case of periodical payments, the production of a receipt for one payment may raise an inference that the previous payments were made (*k*). A receipt is, however, only *prima facie* evidence of payment, and

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(*d*) See *Maillard* v. *Argyle* (*Duke*), 6 Man. & G. 40; *Sayer* v. *Wagstaff*, 14 L. J. Ch. 116.

(*e*) *Currie* v. *Misa*, L. R. 10 Ex., at p. 163; 44 L. J. Ex. 94; *Felix Hadley & Co.* v. *Hadley*, [1898] 2 Ch. 680; 67 L. J. Ch. 694; 79 L. T. 209.

(*f*) *Simon* v. *Lloyd*, 2 Cr. M. & R. 187; 4 L. J. Ex. 195; *Gunn* v. *Bolckow, Vaughan & Co.*, L. R. 10 Ch. 491; 44 L. J. Ch. 732; 32 L. T. 781 (vendor's lien); *Ex p. Matthew*, 12 Q. B. D. 506; 51 L. T. 179 (right to obtain a receiving order for non-compliance with a bankruptcy notice, after service of which a promissory note had been given for the amount of the debt). But a negotiable instrument does not amount to a conditional payment or suspend the remedy of the creditor, where, if it did, the creditor would be deprived of a better remedy than an action on the instrument, as, *e.g.*, where the debt is for rent, in which case the creditor would have a remedy by distress, or where the debt is secured and the creditor has a remedy under the security (*Henderson* v. *Arthur*, [1907] 1 K. B. 10; 76 L. J. K. B. 22; 95 L. T. 772; 23 T. L. R. 60; *Re Defries & Sons, Ltd.*, [1909] 2 Ch. 423; 74 L. J. Ch. 720; 101 L. T. 486; 25 T. L. R. 752).

(*g*) *Price* v. *Price*, 16 M. & W. 232; 16 L. J. Ex. 99; 73 R. R. 476; *Davis* v. *Reilly*, [1898] 1 Q. B. 1; 66 L. J. Q. B. 844; 77 L. T. 399. In the case, however, of a cheque, the debtor may be discharged if it is not presented within a reasonable time (Bills of Exchange Act, 1882, s. 74, *post*, Part II., Chapter V.). A lien is not affected by the fact that a negotiable instrument accepted in conditional payment is in the hands of third parties (*Gunn* v. *Bolckow, Vaughan & Co.* (*ubi supra*)).

(*h*) *Felix Hadley & Co.* v. *Hadley* (*ubi supra*); and see *Marreco* v. *Richardson*, [1908] 2 K. B., at p. 593; 77 L. J. K. B. 859; 99 L. T. 486; 24 T. L. R. 624.

(*i*) *Cooper* v. *Turner*, 2 Stark. 497.

(*k*) On the sale of leasehold property the production by the vendor of the receipt for the last rent raises a presumption of law that all the covenants of the lease have been performed (s. 4 (2) of the Law of Property Act, 1925, re-enacting s. 3 of the Conveyancing Act, 1881).

may be contradicted unless the person who gave it is estopped from denying its truth (*l*).

Appropriation of payments.—Where a debtor owes various sums for debts contracted at different dates and makes a payment which is not sufficient to discharge his whole liability, the question as to which debt is discharged is governed by the following rules:—

i. The debtor may at the time of payment appropriate his payment to any of the debts; his appropriation need not be express, but may be inferred from the circumstances (*m*).

ii. If the debtor makes no appropriation, the creditor may appropriate the payment to any of the debts, even though barred by a Statute of Limitations (*n*), and his appropriation may be made at any time before judgment (*o*).

iii. If in the case of a *current account* no appropriation is made by either debtor or creditor, the law considers that the payment is made in respect of the earliest debts (*p*).

The rule is not an invariable rule of law, and may be excluded by the circumstances of the particular case (*q*); it does not apply as between trustee and *cestui que trust* (*r*).

Tender.—Tender is the offer by a promisor to perform his obligation. If his obligation is to perform some act other than the payment of money, he is discharged by the mere tender of performance, and on the refusal of the promisee to accept it the

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(*l*) *Phillips* v. *Warren*, 14 M. & W. 379; 14 L. J. Ex. 280; *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J. Ex. 262; 115 R. R. 801; *Lee* v. *Lancashire and Yorkshire Railway*, L. R. 6 Ch., at pp. 534, 536; 25 L. T. 77. A receipt on the back of a bill or note requires a receipt stamp (58 Vict. c. 16, s. 9).

(*m*) *Marryatts* v. *White*, 2 Stark. 101 (payment of the exact amount of one item).

(*n*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750.

(*o*) *Seymour* v. *Pickett*, [1905] 1 K. B. 715; 74 L. J. K. B. 413; 92 L. T. 519; 22 T. L. R. 682 (appropriation by creditor when in witness-box held valid).

(*p*) *Clayton's Case*, 1 Mer. 585; 15 R. R. 561; *The Mecca* (*infra*); *Deeley* v. *Lloyds Bank, Ltd.*, [1912] A. C. 756; 81 L. J. Ch. 697; 107 L. T. 465; 29 T. L. R. 1.

(*q*) *The Mecca*, [1897] A. C. 286; 66 L. J. P. 86; 76 L. T. 579.

(*r*) *Re Hallett's Estate*, 13 Ch. D. 696; 49 L. J. Ch. 415. See Wilshere's **Equity, Chapter II., s. 1.**

contract is discharged by breach (*s*). If his obligation is to pay a liquidated sum of money, the tender of payment does not discharge him, but bars any claim for further interest (*t*), and can be pleaded as a defence to any subsequent action for the debt. By the plea of tender the defendant admits his liability to the extent of the amount tendered, but sets up that he has always been ready and willing to pay, and that he has performed his obligation as far as he could, complete performance having been prevented by the plaintiff's refusal to accept; and, since the tender does not discharge the debt that he is still ready and willing to pay, he must therefore, with his defence, pay into Court the sum alleged to have been tendered, and, if he proves a valid tender of the whole amount due, he will succeed in the action and will be entitled to recover judgment for his costs (*u*).

A tender of payment must satisfy the following conditions:—

i. It must be in legal tender. At Common Law it must be made in current coin of the realm (*x*), but by statute it may be made by Bank of England notes or Treasury notes (*y*). Although, however, a creditor has a legal right to notes or cash, a tender made in some other form, *e.g.*, by cheque, is good if the creditor has expressly waived his right, *e.g.*, by asking for a cheque (*z*), or has made no objection to the tender on the ground of its form (*a*).

(*s*) *Startup* v. *Macdonald*, 6 Man. & G. 593; 12 L. J. C. P. 477; 64 R. R. 810. The tender must be at a reasonable time, and, if any place for performance is fixed by the contract, at that place (*id.*).

(*t*) *Graham* v. *Seal*, 88 L. J. Ch. 31; 119 L. T. 526.

(*u*) *Dixon* v. *Clark*, 5 C. B. 365; 16 L. J. C. P. 237; 75 R. R. 747; Bullen & Leake's Pleadings (3rd ed.), p. 693; Order XXII, r. 3. The essence of the plea is the continued readiness of the debtor to pay. If, therefore, after refusing tender, the creditor makes a subsequent demand which is refused by the debtor, the plea of tender fails (*Hayward* v. *Hague*, 4 Esp. 93). The plea of tender cannot be raised in an action for *unliquidated* damages (*Davys* v. *Richardson*, 21 Q. B. D. 202; 57 L. J. Q. B. 409; 59 L. T. 765).

(*x*) *Polglass* v. *Oliver*, 2 C. & J. 15; 1 L. J. Ex. 5.

(*y*) By the *Bank of England Act*, 1833 (3 & 4 Will. 4, c. 98), s. 6, Bank of England notes are legal tender for any sum *above* £5, except by the Bank itself or any branch thereof. By the *Currency and Bank Notes Act*, 1914 (4 & 5 Geo. 5, c. 14), Treasury notes are legal tender for the payment of any amount. By the *Coinage Act*, 1870 (33 & 34 Vict. c. 10), s. 4, coins issued by the Mint, and not called in by Royal Proclamation, and of legal weight, are valid tender (a) in gold for any amount, (b) in silver up to 40s., and (c) in bronze up to 1s.

(*z*) *Cubitt* v. *Gamble*, 35 T. L. R. 223.

(*a*) *Polglass* v. *Oliver* (*ubi supra*); *Jones* v. *Arthur*, 8 Dowl. 442; 59 R. R. 833.

ii. It must be before action (*b*).

iii. It must be by the debtor (*c*), or someone on his behalf, to the creditor, or a person having actual or apparent authority to receive it (*d*).

iv. It must be of the exact sum due, but a tender of a larger sum is valid if no change is required (*e*) or if no objection is made on the ground of change being required (*f*).

v. The money must be actually produced unless the creditor expressly or by conduct dispenses with production (*g*).

vi. The tender must be unconditional, so that if the creditor takes the money and more is in fact due, he may bring an action for the residue. It is therefore valid if offered by the debtor simply as being all that he admits to be due; but is invalid if offered upon the terms that the creditor is to admit that no more is due and to accept it in full settlement of his claims (*h*). A tender is not, however, invalid merely because it is made under protest (*i*). Nor is a tender invalid merely because the debtor asks for a receipt (*k*), though it may be invalid if it is made subject to the condition of getting a receipt (*l*).

Set-off.—If A owes to B a debt of £100 and B also owes to A a debt of £100, these debts do not automatically discharge each other, though A and B may make a settlement of accounts by agreeing that they shall be set off against each other, such an agreement being equivalent to payment by each (*m*). But *in an*

(*b*) See *Briggs* v. *Calverly*, 8 T. R. 629.

(*c*) *Read* v. *Goldring*, 2 M. & S. 86; 14 R. R. 594.

(*d*) See *Finch* v. *Boning*, 4 C. P. D. 143; 40 L. T. 434 (reviewing earlier authorities). A tender to one of several joint creditors or by one of several joint debtors operates as a tender to or by all (Bullen & Leake's Pleadings (3rd ed.), p. 694; *Douglas* v. *Patrick*, 3 T. R. 683; 1 R. R. 793).

(*e*) *Robinson* v. *Cook*, 6 Taunt. 336; 16 R. R. 624; *Dean* v. *James*, 4 B. & Ad. 547; 2 L. J. K. B. 94.

(*f*) *Saunders* v. *Graham*, Gow, 121.

(*g*) *Finch* v. *Brook*, 1 Bing. N. C. 253; 4 L. J. C. P. 1; 41 R. R. 595.

(*h*) *Mitchell* v. *King*, 6 C. & P. 237; 40 R. R. 810; *Hastings* (*Marquis*) v. *Thorley*, 8 C. & P. 573; *Bowen* v. *Owen*, 11 Q. B. 130; 17 L. J. Q. B. 5.

(*i*) *Scott* v. *Uxbridge, etc., Railway Co.*, L. R. 1 C. P. 596; 35 L. J. C. P. 293; *Greenwood* v. *Sutcliffe*, [1892] 1 Ch. 1; 61 L. J. Ch. 59; 65 L. T. 797.

(*k*) *Jones* v. *Arthur*, 8 Dowl. 442; 59 R. R. 833.

(*l*) *Laing* v. *Meader*, 1 C. & P. 257. But by the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 103, if the amount exceeds £2, the creditor is liable to a penalty of £10 if he refuses to give a duly stamped receipt.

(*m*) *Ashby* v. *James*, 11 M. & W. 542; 12 L. J. Ex. 295; and see *ante*, p. 175.

action brought by A against B it is possible for B to set up as a *defence* a claim to set off against his liability to A the debt due to himself from A.

At Common Law a defendant had no such right, and was compelled to bring a cross-action in order to recover any debt due to him from the plaintiff (*n*). By the Statutes of Set-off (*o*), it was, however, provided that where there were mutual debts between a plaintiff and a defendant, one debt might be set off against the other. This principle was extended by the Judicature Act, 1873 (*p*), and it is now possible for a defendant to set up by his pleading either a set-off or a *counterclaim*. But the Act did not alter the nature of a set-off, which is quite distinct from a counterclaim. A set-off can be pleaded only where (i) the claims on both sides are for liquidated debts, and (ii) due from and to the same parties in the same right (*q*), and (iii) the debt which the defendant claims to set off was due and enforceable by action at the date of the writ (*r*). A set-off is merely a defence; if it is less than the plaintiff's claim, the plaintiff will get judgment for the balance; if it equals the plaintiff's claim the defendant will get judgment; but if the defendant's claim exceeds that of the plaintiff he cannot obtain judgment for the excess unless he sets it up as a counterclaim. A counterclaim is a cross-action, which need not be for liquidated damages, nor even of the same nature as the original action; thus a claim founded on tort may be opposed to one founded on contract. It is treated, for all purposes except execution, as an independent action: thus there are two judgments, one on the claim and one on the counterclaim; so that, if the defendant has merely a counterclaim for the same amount as the plaintiff's claim, the plaintiff will get judgment on the claim with his costs

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(*n*) A defendant might, however, in some cases set up as against the plaintiff a claim arising out of the same transaction. Thus, in an action for the price of goods, he might, in reduction of the price, set up a claim for damages for breach of warranty (see *Street* v. *Blay*, 2 B. & Ad. 456; 36 R. R. 626).

(*o*) 2 Geo. 2, c. 22; 8 Geo. 2, c. 24, repealed by the Statute Law Revision Acts, 1879 and 1883.

(*p*) S. 24 (3).

(*q*) See Bullen & Leake's Pleadings (3rd ed.), p. 679.

(*r*) *Ibid.*; and see *Rawley* v. *Rawley*, 1 Q. B. D. 460; 45 L. J. Q. B. 675; 35 L. T. 191.

of the claim, and the defendant will get judgment on the counterclaim with the costs occasioned by it, and execution will issue for the balance (*s*).

Discharge by breach.—This may take place (i) by repudiation of the contract by the promisor; (ii) by conduct on his part rendering performance impossible; and (iii) by his failure to perform it.

Repudiation by promisor.—If a person, having contracted to perform an act at a future date, intimates before that date that he does not intend to perform it, the contract is not thereby rescinded; but the other party has an option to terminate the contract, or to treat the contract as still existing and to hold the party repudiating the contract to his obligation when the time fixed for performance arrives. If the promisee terminates the contract, he may at once bring an action for the breach, and will be entitled to such damages as would have arisen from non-performance at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss. If, on the other hand, he treats the contract as still existing, he keeps it alive for the benefit of the other party, as well as himself; he remains liable to all his own obligations under it, and enables the other party not only to complete the contract, notwithstanding his previous repudiation, but to take advantage of any supervening circumstance which would justify him in refusing to complete it (*t*), as, *e.g.*, of an outbreak of war rendering its performance illegal (*u*). But in the

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(*s*) See, generally, as to set-off and counterclaim, Annual Practice, Order XIX, r. 3, and notes thereon.

(*t*) *Frost* v. *Knight*, L. R. 7 Ex., at pp. 112, 113; 41 L. J. Ex. 78; 26 L. T. 77; cited and approved in *Johnstone* v. *Milling* (*infra*), and in *Michael* v. *Hart & Co.*, [1902] 1 K. B., at p. 490; 71 L. J. K. B. 265; 86 L. T. 474; 18 T. L. R. 254. See also the definition of "rescission" in *Re Atkinson & Horsell*, [1912] 2 Ch., at p. 12; 91 L. J. Ch. 588; 106 L. T. 548. The leading authority is that of *Hochster* v. *De la Tour*, 22 L. J. Q. B. 455; 2 E. & B. 678. Here A in April engaged B as a courier for the month of June, but in May wrote to B that he should not require his services. *Held*, that B need not wait until June before bringing an action for breach of contract. This case was followed in *Frost* v. *Knight*, where the defendant promised that on the death of his father he would marry the plaintiff, but during the lifetime of his father announced his intention of not fulfilling his promise, and broke off the engagement.

(*u*) *Avery* v. *Bowden*, 26 L. J. Q. B. 3; 5 E. & B. 714.

case of a contract containing various stipulations, as, *e.g.*, in a lease, the repudiation merely of one term does not entitle the promisee to rescind, unless the term is a condition of the contract or the repudiation goes to the root of the whole contract (*x*).

Where no time is fixed for the performance of a contract the inference is that it is to be performed in a reasonable time (*y*), and if either party fails to perform his part within a reasonable time the other party may by notice terminate the contract (*z*), and where there has been an " inordinate lapse of time " during which neither party has performed or required performance of the contract, the inference may be drawn that the parties have mutually abandoned the contract (*a*).

If during the performance of a contract the promisor refuses to carry it out, the promisee is discharged from any obligations resting upon him (*b*), and upon proof that he was willing and able to complete his part of the contract is entitled to bring an action for breach of contract (*c*).

Impossibility caused by promisor.—The same rules apply where the promisor, either before the time for performance (*d*) or during performance, by his own conduct renders performance impossible (*e*).

Discharge by non-performance.—Here, if the contract is wholly unperformed by the promisor, the promisee is released from any promises on his part which form the consideration for the promise of the other party, and may also maintain an action for breach of contract. Many difficulties, however, arise in case of a *partial*

(*x*) *Johnstone* v. *Milling*, 16 Q. B. D. 460; 55 L. J. Q. B. 162; 54 L. T. 629.

(*y*) *Scott* v. *Ebury* (*Lord*), L. R. 2 C. P., at p. 269; 36 L. J. C. P. 161; 15 L. T. 506.

(*z*) *Jones* v. *Gibbons*, 8 Ex. 920; 22 L. J. Ex. 347; 91 R. R. 841.

(*a*) *Pearl Mill Co.* v. *Ivy Tannery Co.*, [1919] 1 K. B. 78; 88 L. J. K. B. 134; 120 L. T. 28.

(*b*) Thus the wrongful dismissal of a servant releases him from a covenant not to compete with his employer after the termination of his employment (*General Billposting Co.* v. *Atkinson*, [1909] A. C. 118; 78 L. J. Ch. 77; 99; L. T. 943; 25 T. L. R. 178).

(*c*) *Cort* v. *Ambergate Railway*, 17 Q. B. 127; 20 L. J. Q. B. 460.

(*d*) *Short* v. *Stone*, 8 Q. B. 358; 15 L. J. Q. B. 143; *Lovelock* v. *Franklyn*, 8 Q. B. 371; 15 L. J. Q. B. 146.

(*e*) *Planché* v. *Colburn*, 8 Bing. 14; 5 C. & P. 58; 1 L. J. C. P. 7; 34 R. R. 613; *O'Neil* v. *Armstrong*, [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; 73 L. T. 178.

non-performance and a *partial breach*. Here the general rule is that a mere partial non-performance or partial breach, though it always entitles the other party to damages, does not entitle him to rescind the contract, unless it is so substantial as to strike at the root of the whole contract. There are, however, three classes of cases which must be distinguished:—

1. *Partial performance of entire contracts.*—Where a contract is *entire*, *i.e.*, a contract to do specific work for one specific sum, the promisor cannot as a general rule recover *any* payment if he fails to complete it (*f*) or to fulfil one essential term of the contract (*g*). But if a contractor substantially completes the work which he has contracted to do, this rule does not disentitle him to recover the price merely because some portions are insufficiently or badly done, though in such a case the other party is entitled to deduct such an amount as would be required to complete the work according to the contract (*h*). The rule, moreover, applies only to entire contracts, not to those which are divisible (*i*).

And in two cases the rule is excluded to the extent of allowing the promisor to recover on a *quantum meruit*, *i.e.*, for the amount of the work actually done. These cases are (*k*):—

i. Where it was through the fault of the other party that the work was incomplete (*l*).

ii. Where, though he himself has abandoned or failed to complete the work, there is something to justify the inference of a new contract to pay for what was

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(*f*) *Cutter* v. *Powell*, 6 Durn. & E. 320 (contract by which Cutter was hired to act as second mate for a payment of thirty guineas, provided that he "proceeded, continued and did his duty as second mate on the ship from Jamaica to Liverpool": he died a few days before reaching Liverpool. *Held*, that his executrix could recover no part of the thirty guineas); *Sinclair* v. *Bowles*, 9 B. & C. 92; 7 L. J. K. B. 178; 32 R. R. 589 (contract to repair and make perfect three chandeliers). The jury found that the work had not been substantially completed. *Held*, that the plaintiff was not entitled to recover anything for the work which he had done.

(*g*) *Vigers* v. *Cook*, [1919] 2 K. B. 475; 88 L. J. K. B. 1132; 121 L. T. 357; 35 T. L. R. 605.

(*h*) *Dakin & Co.* v. *Lee*, [1916] 1 K. B. 566; 84 L. J. K. B. 2031; 113 L. T. 903. As to the headnote in this case, see [1919] 2 K. B., at p. 484.

(*i*) *Mavor* v. *Pyne*, 3 Bing. 228; 4 L. J. C. P. 36; 28 R. R. 625.

(*k*) *Forman* v. *Liddesdale*, [1900] A. C., at p. 202; 69 L. J. P. 44; 82 L. T. 331; *Appleby* v. *Myers*, L. R. 2 C. P., at p. 661; 36 L. J. C. P. 331; 16 L. T. 669.

(*l*) *Planché* v. *Colburn*, 8 Bing. 14; 5 C. & P. 58; 1 L. J. C. P. 7; 34 R. R. 613.

done (*m*). But such an inference will not arise merely from the fact that the other party has accepted the benefit of the work done, unless the circumstances were such as to give him the option of refusing or accepting it (*n*).

But no claim can be made upon a *quantum meruit* which is inconsistent with the terms of an express contract (*o*).

2. *Instalment contracts.*—Where a contract contains various stipulations by both parties, the performance of which is spread over a considerable period of time, the failure by one party to perform any one stipulation in accordance with the contract does not entitle the other party to terminate the whole contract, unless the repudiation goes to the root or essence of the contract and amounts in substance to a repudiation of the whole contract, or the stipulation is a condition of the contract (*p*).

3. *Breach of condition.*—As we have already seen, parties may expressly make some event a condition precedent or condition subsequent, so that on its occurrence some liability accrues or is discharged. But the condition of which we now have to speak is a *promissory* condition, the *breach* of which discharges a contract.

Every promise which forms one of the actual terms of a contract is either a condition or a warranty. A condition is a vital term the non-performance of which amounts to a substantial failure to perform the contract at all; a warranty is a term which is not so vital that a failure to perform it goes to the substance of the contract (*q*). "Both classes are equally obligations under the

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(*m*) See *Appleby* v. *Myers*, L. R. 2 C. P., at pp. 659, 660; 36 L. J. C. P. 651, and cases there cited.

(*n*) *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673; 67 L. J. Q. B. 545; 78 L. T. 378. Here A, having contracted to erect buildings on B's land, left them unfinished; and they were completed by B, who used some of the materials left on the land by A. *Held*, that B's completion of the work raised no inference of a new contract to pay A for the *work* which he had done, although B must pay the value of the materials used by him.

(*o*) *Cutter* v. *Powell* (*ubi supra*).

(*p*) *Mersey Steel and Iron Co.* v. *Naylor*, 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 637; and as to the sale of goods, see s. 31 of the Sale of Goods Act, 1893, *post*, Part 2, Chapter 4.

(*q*) *Wallis, Son & Wells* v. *Pratt* (*infra*). "The proper significance of the word [warranty] in the law of England is an agreement which refers to the subject-matter of a contract; but, not being an essential part of the contract, either intrinsically or by agreement, is collateral to the main purpose of such a

contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance, and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. . . . Later usage has consecrated the term 'condition' to describe an obligation of the former class, and 'warranty' to describe an obligation of the latter class" (*r*).

Whether any term is a condition or a warranty depends, as a rule, upon the circumstances of the case, though the parties may in any case expressly provide that a term of the contract shall be a condition (*s*). But if after breach of a condition the other party does not take steps to terminate the contract, but continues to accept performance or otherwise to treat it as existing, he can henceforth only treat the condition as if it were a warranty, and is entitled only to recover damages (*t*).

Discharge of rights of action by Statutes of Limitation.—Those Statutes of Limitation, which relate to contracts (*u*), do not discharge the contract itself, but merely affect the remedy by action, leaving undisturbed any other rights of the creditor, such as a right of lien (*x*) or the right of appropriation in respect of

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contract" (*Dawsons, Ltd.* v. *Bonnin*, [1922] 2 A. C., at p. 422; 91 L. J. P. C. 210; 38 T. L. R. 836).

(*r*) *Wallis, Son & Wells* v. *Pratt & Haynes*, [1910] 2 K. B., at p. 1012, *per* Fletcher Moulton, L.J., whose dissenting judgment was approved by the House of Lords ([1911] A. C. 394; 80 L. J. K. B. 1058; 105 L. T. 146; 27 T. L. R. 431). In earlier cases the term "condition precedent" is sometimes applied to a promissory condition.

(*s*) In the absence of any express declaration of the intention of the parties, the whole contract must be looked at in order to see "whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract . . . a thing different in substance from what . . . [was] stipulated for, or whether it merely partially affects it and may be compensated for in damages." *Bettini* v. *Gye*, 1 Q. B. D., at p. 187; 45 L. J. Q. B. 209; 35 L. T. 572.

(*t*) See *Behn* v. *Burness*, 3 B. & S., at p. 755; 32 L. J. Q. B. 204; 8 L. T. 207.

(*u*) It is otherwise with those which relate to land. See s. 34 of the Real Property Limitation Act, 1833.

(*x*) *Higgins* v. *Scott*, 2 B. & Ad. 413; 9 L. J. K. B. 262; 36 R. R. 607; and see *London and Midland Bank* v. *Mitchell*, [1899] 2 Ch. 161; 68 L. J. Ch. 568; 81 L. T. 263; 15 T. L. R. 420.

payments made by his debtor (*y*). Moreover, even the right of action may, in certain circumstances, be revived; and lastly, the Statutes of Limitation do not automatically bar the right of action, and cannot be relied upon as a defence unless expressly pleaded (*z*).

Different rights of action are governed by different statutes, which do not form a complete code.

1. By s. 3 of the *Limitation Act*, 1623 (*a*), as extended by s. 9 of the *Mercantile Law Amendment Act*, 1856 (*b*), the right of action on a *simple contract* is barred at the end of *six years* from the accrual of the cause of action—that is to say, from the earliest date at which the plaintiff could have brought his action (*c*)—*e.g.*, in an action for a debt, from the date when it was due (*d*); and in an action for damages for breach of contract, from the date of the breach, and not from the date of the damage (*e*). The mere issue of a writ does not keep the cause of action alive indefinitely, as it remains in force for only twelve months, though if reasonable efforts have been made to serve the defendant, or any other good reason is shown, it may be renewed for another six months, and so on from time to time (*f*).

2. By s. 3 of the *Civil Procedure Act*, 1833 (*g*), the right of

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(*y*) *Ante*, p. 179. So also an executor may set off against a legacy a statute-barred debt owing by the legatee to the testator (*Coates* v. *Coates*, 33 L. J. Ch. 448; *Re Akerman*, [1891] 3 Ch. 212; 61 L. J. Ch. 34).

(*z*) Order XIX. rule 15. They do not bar the Crown (see *Public Works Commissioners* v. *Pontypridd, etc., Co.*, [1920] 2 K. B. 233; 89 L. J. K. B. 607; 123 L. T. 334; 36 T. L. R. 459).

(*a*) 21 Jac. 1, c. 16.

(*b*) 19 & 20 Vict. c. 97.

(*c*) See *Reeves* v. *Butcher*, [1891] 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329.

(*d*) *E.g.*, in an action for goods sold, as soon as the property passes to the buyer (Sale of Goods Act, 1893, s. 49 (1), *post*, Part II., Chapter IV.), unless the sale was on credit (*Helps* v. *Winterbottom*, 2 B. & Ad. 431; 9 L. J. K. B. 258; 36 R. R. 609); in an action against the maker of a promissory note payable on demand, from the making of the note (*Re Brown*, [1893] 2 Ch., at p. 304; 62 L. J. Ch. 695; 69 L. T. 12); if the note was payable a certain time after demand, from the date of the demand (*Thorpe* v. *Booth*, R. & M. 388); in an action against the drawer of a bill or the indorser of a bill or note (usually), from the time when he receives notice of its dishonour (see *Castrique* v. *Bernabo*, 6 Q. B. 498; 14 L. J. Q. B. 3; 66 R. R. 475).

(*e*) *Battley* v. *Faulkner*, 3 B. & Ald. 288; 22 R. R. 390. In a contract of indemnity the cause of action arises as soon as the plaintiff was actually damnified (*Collinge* v. *Heywood*, 9 Ad. & E. 633; 8 L. J. Q. B. 98).

(*f*) Order VIII. rule 1.

(*g*) 3 & 4 Will. 4, c. 42.

action on a *specialty contract or a recognisance* is barred in twenty years after the accrual of the cause of action.

Disabilities in the foregoing cases.—In the case of simple and specialty contracts within the above sections:—

i. If the plaintiff was an infant or *non compos mentis* when the cause of action accrued, the operation of the statutes does not begin until he becomes of full age or sound mind (*h*).

ii. If the defendant was beyond seas when the cause of action accrued, the statutes do not operate until his return (*i*). When the operation of the statutes has once begun it is not suspended by a subsequent disability (*k*). Thus, if the defendant returns, for however short a time, the statute is not suspended because he subsequently goes beyond seas again (*l*). In the case of *joint debtors* the absence beyond seas of one or more of them does not prevent the statutes from running against those who are not beyond seas, and if any such joint debtor returns from beyond seas an action against him is not barred by the fact that judgment has been obtained against one or more of those not beyond seas (*m*).

3. By s. 8 of the *Real Property Limitation Act*, 1874 (*n*), the right of action in respect of *money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of*

(*h*) 21 Jac. 1, c. 16, s. 7 (simple contracts); 3 & 4 Will. 4, c. 42, s. 4 (specialties); as amended in both cases by 19 & 20 Vict. c. 97, s. 10 (Mercantile Law Amendment Act, 1856). Under these statutes coverture was also a disability, but since the Married Women's Property Act, 1882, it has ceased to be so (*Lowe* v. *Fox*, 15 Q. B. D. 667; 54 L. J. Q. B. 561).

(*i*) 4 & 5 Anne, c. 16, s. 19 (simple contracts); 3 & 4 Will. 4, c. 42, s. 4 (specialties). No part of the United Kingdom, or of the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to them, being part of the dominions of His Majesty, are beyond seas (3 & 4 Will 4, c. 42, s. 7; 19 & 20 Vict. c. 97, s. 12).

(*k*) *Rhodes* v. *Smethurst*, 6 M. & W. 351; 9 L. J. Ex. 330; 51 R. R. 461.

(*l*) *Gregory* v. *Hurrill*, 5 B. & C. 341; 4 L. J. (o.s.) K. B. 262.

(*m*) 19 & 20 Vict. c. 97, s. 11.

(*n*) 37 & 38 Vict. c. 57, s. 8, re-enacting s. 40 of the Real Property Limitation Act, 1833, with the substitution of twelve years for twenty. The only reference to disabilities in this Act is the provision that time runs only against a person capable of giving a discharge.

land, is barred in *twelve years* after a present right to receive it (*o*) has accrued to some person capable of giving a discharge for or release of it (*p*). The word "judgment" includes all judgments, and not merely those which operate as a charge on land (*q*).

4. By s. 42 of the *Real Property Limitation Act*, 1833 (*r*), the right of action for *arrears of rent or interest in respect of money charged on land* is barred in *six years* after the same has become due. But if there is a covenant to pay rent the action is not barred until twenty years (*s*), and in redemption proceedings the

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(*o*) As to the meaning of the words "present right to receive," see *Chadburn* v. *Winfield*, [1922] 2 Ch. 413; 92 L. J. Ch. 22.

(*p*) If a sum of money is secured by a mortgage on land, and also by a covenant of the mortgagor in the mortgage deed, the remedy on the covenant does not exist for twenty years under 3 & 4 Will. 4, c. 42, s. 3, but is barred as soon as the remedy against the land is barred under 37 & 38 Vict. c. 57, s. 8 (*Sutton* v. *Sutton*, 22 Ch. D. 511; 52 L. J. Ch. 333; 48 L. T. 95; *Kirkland* v. *Peatfield*, [1903] 1 K. B. 756; 72 L. J. K. B. 355; 88 L. T. 472; 19 T. L. R. 362); and this is so, even though the covenant by the mortgagor is contained in a collateral bond (*Fearnside* v. *Flint*, 22 Ch. D. 579; 52 L. J. Ch. 479; 48 L. T. 154). But, as against a surety, whether he gives a collateral bond (*Re Powers*, 30 Ch. D. 291; 53 L. T. 647) or is joined as a surety in the mortgage instrument (*Re Frisby*, 43 Ch. D. 106; 59 L. J. Ch. 94; 61 L. T. 632), the period of limitation is twenty years, the action not being brought to recover money charged on land, but money payable on default of payment by the mortgagor. The proceeds of a sale of land directed to be sold are "land" within s. 8 (see *Chadburn* v. *Winfield*, *ubi supra*). But there is no statute of limitations applying to a mortgage of personalty, and accordingly when there is a mortgage of a mixed fund, consisting partly of the proceeds of the sale of land and partly of personalty other than land, the mortgagee's claim against the personalty is not barred by s. 8 of the Act of 1874 (*Bird* v. *Arnold*, [1926] Ch. 471; 134 L. T. 728.

(*q*) *Jay* v. *Johnstone*, [1893] 1 Q. B. 189; 62 L. J. Q. B. 128; 68 L. T. 129.

(*r*) 3 & 4 Will. 4, c. 27, s. 42.

(*s*) S. 3 of the Civil Procedure Act, 1833 (*ante*, p. 188), which created an exception to the general rule in s. 42 of the Real Property Limitation Act, 1833 (*Paget* v. *Foley*, 2 Bing. N. C. 679; 5 L. J. C. P. 258; 42 R. R. 698), and which, so far as regards rent reserved by a lease, is not affected by s. 8 of the Real Property Limitation Act, 1874 (*Darley* v. *Tennant*, 53 L. T. 257; and see *Lewis* v. *Graham*, 80 L. T. Jo. 66). The exception formerly applied also to a rentcharge (*i.e.*, rent created as an inheritance distinct from the land) and other rents within s. 1 of the Real Property Limitation Act, 1833, which did not apply to rent reserved by a lease (*Grant* v. *Ellis*, 9 M. & W. 113; 11 L. J. Ex. 228; 60 R. R. 694). Thus it was held to apply to arrears of an annuity charged on land, and also secured by the covenant of the grantor so as to enable an action on the covenant to be brought for twenty years (*Hunter* v. *Nockolds*, 1 Mac. & G. 640; 19 L. J. Ch. 177; 84 R. R. 217). But at the date of this last case the *title* to a rent within s. 1 of the Real Property Limitation Act was not barred until twenty years. Now by s. 1 of the Real Property Limitation Act, 1874, it is barred in twelve years, and by s. 8 of this Act the right to recover money charged on land is barred in twelve years. Accordingly, on the analogy of *Sutton* v. *Sutton* (see note (*p*)), at the end of twelve years

mortgagor must pay all arrears of interest (*t*). In this section there is no reference to disabilities.

Revival of right of action.

1. In the *Limitation Act*, 1623, there were no express provisions as to revival. It was, however, held that a cause of action in respect of a *debt* might be taken out of the statute—

i. By an express promise to pay the debt, *or*

ii. By a promise inferred from an acknowledgment or part-payment of the debt.

By s. 1 of *Lord Tenterden's Act*, 1828, any promise or acknowledgment must be in writing signed by the party chargeable, or, by s. 13 of the *Mercantile Law Amendment Act*, 1856, by his agent. An acknowledgment or part-payment must be to the creditor or his agent, and not to a stranger (*u*), and must be by the debtor himself or his agent (*x*), and must be before action (*y*).

An express promise must be unconditional, or, if it is conditional, there must be evidence that the condition has been fulfilled (*z*). An acknowledgment is evidence of a new promise and, as such, revives the old cause of action: from an absolute unconditional acknowledgment a promise to pay on request will always be implied; an acknowledgment may, however, be accompanied by words which negative or qualify the implied promise. Thus, if the debtor writes "I acknowledge the debt, but I refuse to pay it," the refusal negatives any implied promise to pay. Again, if he adds to the acknowledgment an express promise, that express promise will modify and exclude the implied promise: thus, if he write "I acknowledge the debt and will pay it you six months hence," the implied promise which would be a promise to pay forthwith is superseded by the express promise to

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the remedy on the covenant is also barred. See *Skene* v. *Cook*, [1902] 1 K. B. 682; 71 L. J. K. B. 446; 86 L. T. 319; 18 T. L. R. 431; *Shaw* v. *Crompton*, [1910] 2 K. B. 370; 80 L. J. K. B. 52; 103 L. T. 501.

(*t*) *Re Lloyd*, [1903] 1 Ch. 385; 72 L. J. Ch. 78.

(*u*) *Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 765; 61 L. J. Q. B. 405; 66 L. T. 306.

(*x*) *Newbould* v. *Smith*, 33 Ch. D. 127; 55 L. J. Ch. 788; 55 L. T. 194; *Re Hale*, [1899] 2 Ch. 107.

(*y*) *Bateman* v. *Pinder*, 3 Q. B. 574; 11 L. J. Q. B. 281.

(*z*) *Re River Steamer Co.*, 8 Ch., at p. 828; 25 L. T. 319; *Spencer* v. *Hemmerde* (*infra*).

" pay six months hence," and an action cannot be brought until the six months have expired. In every case therefore it is a question for the Court (1) whether there is an acknowledgment in writing; (2) whether there is language which excludes or modifies the promise which, in the absence of anything to the contrary, the law implies from the acknowledgment; (3) if there is such language, whether (i) it amounts to a refusal to pay, in which case there is no promise, whether implied or expressed; or (ii) the facts are such as that the express promise if there be one has matured by effluxion of the time or satisfaction of the condition upon which the promise was expressed to take effect (*a*). An admission by a debtor of the existence of an unsettled account between himself and the creditor amounts to a promise that when the account is settled the balance shall be paid (*b*).

An ordinary " account stated " (*c*) will not revive a statute-barred debt unless it complies with the provisions of Lord Tenterden's Act as to writing and signature (*d*). But where there are items on both sides the Act does not apply. Thus, if A has an account against B, some of the items of which are more than six years old, and B has a cross-account against A, and they strike a balance, this amounts to an agreement to set off B's claim against the earlier items of A's claim, and is not merely an acknowledgment, but an actual settlement of accounts, out of which a new

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(*a*) See *Spencer* v. *Hemmerde*, [1922] 2 A. C. 507; 91 L. J. K. B. 941; 38 T. L. R. 869, in which the authorities on " acknowledgment " were reviewed by Lord Sumner. In this case it was held that the words, " It is not that I won't pay you, but that I can't do so," amounted merely to a statement of inability to pay that was in no way inconsistent with an implied promise to pay, and therefore constituted a sufficient acknowledgment. The chief difficulty arises where an unconditional acknowledgment is followed by words asking for time to pay, or suggesting inability to pay at present and a hope to pay in the future. The question in such cases is whether the subsequent words merely amount to a request, excuse, or hope, or whether they control the acknowledgment by adding a condition upon which payment is to be made (*Collis* v. *Stack*, 1 H. & N. 605; 26 L. J. Ex. 138; *Cooper* v. *Kendall*, [1909] 1 K. B. 405; 78 L. J. K. B. 580; 100 L. T. 251; *Spencer* v. *Hemmerde*, [1922] 2 A. C., at p. 534).

(*b*) *Banner* v. *Berridge*, 18 Ch. D., at p. 274; 50 L. J. Ch. 630; 44 L. T. 680. *A fortiori* if there is an express promise to pay what shall be found due on the taking of the account (*Langrish* v. *Watts*, [1903] 1 K. B. 636; 72 L. J. K. B. 435; 88 L. T. 443; 19 T. L. R. 359). It is not necessary that an acknowledgment should specify the particular debt (*Whitcombe* v. *Steere*, 19 T. L. R. 697).

(*c*) *Ante*, p. 48.

(*d*) *Jones* v. *Ryder*, 4 M. & W. 32; 7 L. J. Ex. 216; 51 R. R. 452.

consideration arises for a promise to pay the balance, and which takes the case out of the operation of the Statute of Limitations (*e*).

A new promise may also be inferred from part payment. But to have this result the payment must be made on account of the debt for which the action is brought, and as part of a larger debt, and in such circumstances that a new promise to pay the residue can be inferred in fact (*f*). No such inference can arise where the debtor expressly pays in respect of a particular item (*g*), or where, in making part payment, he refuses to pay any more (*h*), or where he pays under compulsion of law (*i*). Where there are several debts, some of which are statute-barred, and the debtor pays money on account without appropriating it to any particular debt, this does not amount to part payment so as to take out of the statute the debts due longer than six years (*k*).

2. In the case of specialty debts within s. 3 of the *Civil Procedure Act*, 1833, it is expressly provided by s. 5 of the Act that if any acknowledgment in writing has been made, *either* by writing signed by the party liable, or his agent, *or* by part payment or part satisfaction on account of any principal or interest, an action may be brought within twenty years after such acknowledgment; or, if the party making the acknowledgment is beyond the seas at the time of making it, within twenty years after his return. Under this Act an acknowledgment need not amount to a new promise to the creditor, and may therefore be made to a third party (*l*). But under *all* Statutes of Limitations a part payment, in order to take the case out of the statute, must be such a payment as amounts to an acknowledgment of liability (*m*).

3. In the case of debts charged on or payable out of land

(*e*) *Ashby* v. *James*, 11 M. & W. 542; 12 L. J. Ex. 295; 63 R. R. 676.

(*f*) *Tippetts* v. *Heane*, 3 L. J. Ex. 281; 1 C. M. & R. 252; *Foster* v. *Dawber*, 6 Ex., at p. 853; 20 L. J. Ex. 385; *Wycombe Union Guardians* v. *Eton Union Guardians*, 1 H. & N. 687; 26 L. J. M. C. 97.

(*g*) *Re Rainforth*, 49 L. J. Ch. 5; 41 L. T. 610.

(*h*) *Wainman* v. *Kynman*, 1 Ex. 118; 16 L. J. Ex. 232. In this case it was held to be a question for the jury whether the words used by the debtor amounted to a refusal.

(*i*) *Morgan* v. *Rowlands*, L. R. 7 Q. B. 493; 41 L. J. Q. B. 187.

(*k*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455; 8 L. J. C. P. 276; 50 R. R. 750.

(*l*) *Roddam* v. *Morley*, 1 De G. & J., at p. 15; 26 L. J. Ch. 438; *Moodie* v. *Bannister*, 4 Drew. 433; 28 L. J. Ch. 881.

(*m*) *Harlock* v. *Ashbery*, 19 Ch. D., at p. 548; 51 L. J. Ch. 394; 46 L. T. 356; *Taylor* v. *Hollard*, [1902] 1 K. B. 676; 71 L. J. K. B. 278.

within s. 8 of the *Real Property Limitation Act*, 1874, there is in the same section an express provision allowing an action to be brought within twelve years after "some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent." Under this Act also an acknowledgment need not amount to a fresh promise (*n*).

4. In the case of arrears of rent under s. 42 of the *Real Property Limitation Act*, 1833, there is no provision as to part payment; but the section provides that an action may be brought within six years after an acknowledgment in writing has been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent.

Joint debtors.—In the case of joint debtors by *simple contract*, it is expressly provided by statute that neither an acknowledgment (*o*) nor a part payment (*p*) by one of them prevents the operation of the statutes as regards the rest.

The provision as to *part payment* applies also to joint debtors by specialty contract under s. 3 of the Civil Procedure Act, 1833. But in all other cases an acknowledgment or part payment by one of several joint obligors prevents the statute from running as regards all (*q*).

Fraud.—The statutes begin to run although the plaintiff was unaware of the accrual of the cause of action (*r*), and at Common Law it was not a defence even that the cause of action was fraudulently concealed from the plaintiff by the defendant. But in the Court of Chancery the right of a defrauded party was not affected by lapse of time, so long as, without any fault of

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(*n*) *Re Lacey*, [1907] 1 Ch., at p. 342; 76 L. J. Ch. 316; 96 L. T. 306.

(*o*) 9 Geo. 4, c. 14, s. 1 (Lord Tenterden's Act, 1828).

(*p*) Mercantile Law Amendment Act, 1856, s. 14. This section applies to "co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally."

(*q*) *Read* v. *Price*, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 100 L. T. 60; 25 T. L. R. 701 (acknowledgment—decision on ss. 3 and 5 of the Civil Procedure Act, 1833); *Re Lacy*, [1907] 1 Ch. 330; 76 L. J. Ch. 316; 96 L. T. 306 (part payment—decision on s. 6 of the Real Property Limitation Act, 1874).

(*r*) *Short* v. *M'Carthy*, 3 B. & Ald. 626; 22 R. R. 503.

his own, he remained in ignorance of the fraud that had been committed; and, since the Judicature Act, 1873, this rule has prevailed in all Courts (*s*).

Section 3.—*Remedies for Breach of Contract.*

Common Law Remedies.—These were the actions for debt and for damages.

Debt was an action for a liquidated (*i.e.*, ascertained) amount due under a promise to pay (*t*), the cause of action being the breach of promise, whereas an action for damages was an action for an amount to be assessed as compensation to the plaintiff for the breach by the defendant of a contract with respect to the performance of some act other than payment of money. The distinction is still of importance for some purposes (*u*), and is illustrated by ss. 49—51 of the *Sale of Goods Act*, 1893, which distinguish between an action for the *price* of goods sold and an action for damages (*x*). It may be noted that where there is a present debt and a promise to pay on demand, a demand is not a condition precedent to the bringing of an action: but where the promise is by a collateral debtor (*e.g.*, a surety), no cause of action accrues until demand has been made (*y*).

Interest upon a debt is recoverable only by statute or by contract (*z*), either express or inferred from the course of dealing between the parties (*a*). By the *Civil Procedure Act*, 1833,

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(*s*) *Gibbs* v. *Guild*, 9 Q. B. D. 59; 51 L. J. Q. B. 313; 46 L. T. 248; *Oelkers* v. *Ellis*, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 332.

(*t*) The actions of Debt and Detinue spring from the same root, the cause of action in debt being originally the detention by the defendant of a specific sum belonging to the plaintiff.

(*u*) Thus, under the Statutes of Limitation, only a debt, and not a right to unliquidated damages, can be revived by an acknowledgment. Again, it is provided by Order III., rule 6, that a writ can be specially indorsed only where the plaintiff seeks to recover a "debt or liquidated demand in money."

(*x*) *Post*, Part II., Chapter V.

(*y*) *Re Brown*, [1893] 2 Ch. 300; 63 L. J. Ch. 695; 69 L. T. 12. And, in the absence of special agreement, the customer of a bank may not sue the banker for the balance standing to the credit of his current account without making a previous demand for payment (*Joachimson* v. *Swiss Bank Corporation*, [1921] 3 K. B. 110; 90 L. J. K. B. 973; 125 L. T. 338; 37 T. L. R. 534).

(*z*) *Re Gosman*, 17 Ch. D., at p. 772; 50 L. J. Ch. 624.

(*a*) *Re Marquis of Anglesey*, [1901] 2 Ch. 548; 70 L. J. Ch. 810; 85 L. T. 175.

" upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand, until the time of payment " (*b*). It is also provided that a jury may give *damages* in the nature of interest over and above all money recoverable in all actions on policies of insurance (*c*). By the *Bills of Exchange Act*, 1882, the damages recoverable from the parties to a dishonoured bill of exchange, promissory note, or cheque include interest (*d*); and where a debtor undertakes to give a bill or note and fails to do so, the debt will bear interest from the time when the bill or note would have been due (*e*).

It may here be noted that a *judgment* of the High Court carries interest at 4 per cent. from its date, both on the judgment and on the costs (*f*). A County Court judgment does not carry interest (*g*).

Damages.—The general rule for the assessment of damages for breach of contract is that " where a party sustains a loss by reason of a breach of contract, he is, *so far as money can do it*, to be placed in the same situation, with respect to damages, as if the contract had been performed " (*h*). " The fundamental

(*b*) 3 & 4 Will. 4, c. 42, s. 28.
(*c*) *Id.*, s. 29.
(*d*) *Post*, Part II., Chapter V.
(*e*) *Marshall* v. *Poole*, 13 East, 98; 12 R. R. 310; *Davis* v. *Smyth*, 8 M. & W. 399; 10 L. J. Ex. 473. So also a surety who guarantees payment of a bill or note is liable for any interest which could have been recovered from the principal (*Ackerman* v. *Ehrenspenger*, 16 M. & W. 99; 16 L. J. Ex. 3).
(*f*) 1 & 2 Vict. c. 110, ss. 17, 18; Order XLI. rule 3; Order XLII. rule 16. Interest on the costs runs from the date of the judgment, not the date of taxation (*Boswell* v. *Coaks*, 57 L. J. Ch. 101; 57 L. T. 742).
(*g*) *R.* v. *Essex County Court Judge*, 18 Q. B. D. 704; 56 L. J. Q. B. 315; 57 L. T. 643.
(*h*) *Robinson* v. *Harman*, 1 Ex., at p. 855; *Watts & Co., Ltd.* v. *Mitsui, Ltd.*, [1917] A. C., at p. 241; 86 L. J. K. B. 873; 116 L. T. 353; 33 T. L. R. 262.

basis is thus compensation for pecuniary loss . . . but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps " (*i*). Thus, where a person who has contracted to purchase goods is notified by the vendor that he cannot deliver the goods at the proper date and the market price of the goods is rising, the purchaser is not entitled to wait and watch the rising market until the proper date of delivery and then claim as damages the difference between the contract price and the then market price, but is bound to mitigate the loss by buying the goods elsewhere as soon as he can (*k*). So also a servant who is wrongfully dismissed must endeavour to mitigate the damages by obtaining other employment (*l*).

It must be noticed that damages for breach of contract are in the nature of compensation, not punishment, and that the measure of compensation is the pecuniary loss: to this general rule there are, however, three exceptions (*m*).

i. Actions against a banker for refusing to pay a customer's cheque when he has funds of the customer's to meet it. The relation between a banker and his customer is not that of trustee and *cestui que trust* but that of debtor and creditor, with a superadded obligation, arising out of the custom of bankers, to honour cheques drawn on him by his customer to the extent of the sum for which the customer is his creditor (*n*). If a banker dishonours a cheque drawn on him by his customer, having funds of his customer sufficient to meet it, he is liable to an action for damages in which the customer, though he has sustained no

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(*i*) *British Westinghouse Co., Ltd.* v. *Underground Railways of London, Ltd.*, [1912] A. C., at p. 689; 81 L. J. K. B. 1130; 107 L. T. 325; and see *Frost* v. *Knight*, L. R. 7 Ex., at p. 113, cited *ante*, p. 183.

(*k*) *Nickoll & Knight* v. *Ashton, Eldridge & Co.*, [1900] 2 Q. B., at p. 305; 69 L. J. Q. B. 640; 82 L. T. 761. See also *Payzu, Ltd.* v. *Saunders*, [1919] 2 K. B. 581; 89 L. J. K. B. 17; 35 T. L. R. 657 (unreasonable refusal by the purchaser to accept an offer made by the vendor which would have diminished the damages); *British Stamp, etc.* v. *Haynes*, [1921] 1 K. B. 377; 90 L. J. K. B. 271.

(*l*) *Brace* v. *Calder*, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829.

(*m*) *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C., at pp. 494, 495; 78 L. J. K. B. 1122; 101 L. T. 466.

(*n*) *Foley* v. *Hill*, 2 H. L. C. 28; 13 L. J. Ch. 182.

pecuniary damage, may recover substantial damages for injury to his credit (*o*).

ii. Actions for breach of promise of marriage. Here the damages are not limited to actual pecuniary loss, but the jury may take into consideration the injury to the plaintiff's feelings and any circumstances of aggravation occasioned by the conduct of the defendant (*p*), as, *e.g.*, where the plaintiff has been seduced by the defendant (*q*), and may award vindictive damages, not merely to compensate the plaintiff but to punish the defendant in an exemplary manner (*r*).

iii. Actions against a vendor of real property who, without any fault on his part, fails to make title. If a vendor of land refuses to complete or fails to take any steps necessary for completion, the purchaser may recover damages for the loss of his bargain (*s*). But if the vendor is unable to complete his contract owing to a defect in title, the purchaser cannot in an action of contract recover more than the expenses incurred in investigating title and his proper conveyancing expenses (*t*). An action by a vendor against a purchaser who fails to complete is governed by the ordinary rules relating to damages, and the vendor can recover the difference between the purchase price and the market price (*u*).

General and special damage.—General damage is that damage "which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby* v. *White* (*x*). In

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(*o*) *Rolin* v. *Steward*, 14 C. B. 595; 23 L. J. C. P. 148; *Fleming* v. *Bank of New Zealand*, [1900] A. C., at p. 587; 69 L. J. C. P. 120; 83 L. T. 1; 16 T. L. R. 468.

(*p*) *Smith* v. *Woodfine*, 1 C. B. (N.S.) 660; *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664.

(*q*) *Berry* v. *Da Costa*, L. R. 1 C. P. 331; 35 L. J. C. P. 191.

(*r*) 20 Q. B. D., at p. 505.

(*s*) *Day* v. *Singleton*, [1899] 2 Ch. 320; 68 L. J. Ch. 593; 81 L. T. 306; *Jones* v. *Gardiner*, [1902] 1 Ch. 191; 71 L. J. Ch. 93; 86 L. T. 74; *Re Daniel*, [1917] 2 Ch. 405; 117 L. T. 472; 33 T. L. R. 503.

(*t*) *Flureau* v. *Thornhill*, 2 W. Bl. 1078; *Bain* v. *Fothergill*, L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387; *Jones* v. *Gardiner* (*ubi supra*). But if the vendor is guilty of fraud the purchaser may recover damages by an action of deceit (L. R. 7 H. L., at p. 207).

(*u*) *Laird* v. *Pim*, 7 M. & W. 474; 10 L. J. Ex. 259; *Noble* v. *Edwardes*, 5 Ch. D., at pp. 384, 385; 37 L. T. 7. If the vendor has forfeited the deposit, it must be taken into account in calculating the damages (*Ockenden* v. *Henley*, E. B. & E. 485; 27 L. J. Q. B. 361).

(*x*) 2 Ld. Raym. 938; *ante*, p. 8.

all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's right and calls it *general damage*" (*y*). The term applies to all damage of a *kind* which can be presumed to flow, in the ordinary course of things, from the breach of a contract of the particular *nature*, though the amount may, according to the circumstances of the case, be either *nominal* (*e.g.*, one shilling) (*z*) or *real*. The term *special damage*, on the other hand, is applicable to all injury or loss, beyond the general damage, which is not of such a kind that it would necessarily result in all contracts of the particular nature, but which has in fact resulted in the *particular case* (*a*). Special damage must always be alleged with particulars by the plaintiff in his pleading (*b*).

Thus, in an action for breach of promise of marriage, damages for injury to the feelings of the plaintiff are general damages, which may vary according to the circumstances accompanying the breach; but any pecuniary loss is special damage, which must be expressly claimed (*c*). So also, in an action against a banker for dishonouring a cheque, the damages for loss of credit are general damages, which may be nominal (*d*) or real (*e*), and in the latter case may be either small or large (*f*); but if the plaintiff claims that he has lost custom or credit from particular individuals, that is special damage and must be expressly alleged (*g*).

The assessment of damages is for the jury, and it is no defence that the calculation is difficult or that it depends upon contingencies (*h*). But with regard to special damage there may be

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(*y*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B., at p. 528; 61 L. J. Q. B. 535; 66 L. T. 794.

(*z*) See *Sapwell* v. *Bass*, [1910] 2 K. B. 486; 79 L. J. K. B. 932; 102 L. T. 811; 26 T. L. R. 452.

(*a*) In connection with torts "special damage" has a third meaning. *Post*, Part III., Introduction.

(*b*) *Ratcliffe* v. *Evans* (*ubi supra*); *Fleming* v. *Bank of New Zealand* (*ubi supra*).

(*c*) *Finlay* v. *Chirney*, 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664.

(*d*) *Marzetti* v. *Williams*, 1 B. & Ad. 415; 9 L. J. K. B. 42; 35 R. R. 329.

(*e*) See cases cited in note (*o*), *ante*, p. 198.

(*f*) See *Admiralty Commissioners* v. *S.S. Susquehanna*, [1926] A. C., at p. 660, explaining the difference between small and nominal damages.

(*g*) *Fleming* v. *Bank of New Zealand* (*ubi supra*).

(*h*) *Chaplin* v. *Hicks*, [1911] 1 K. B. 786; 80 L. J. K. B. 1292; 105 L. T. 285; 27 T. L. R. 458.

a preliminary question, which is for the Judge (*i*), namely, whether or not the damages are too remote to be recoverable.

Remoteness of damage.—In an action for breach of contract special damages claimed by the plaintiff may, on two distinct grounds, be too remote to be recoverable from the defendant. These grounds are (1) that the damages are due to circumstances which are *extraneous to the contract*, and (2) that there is no sufficient *causal connection* between the breach of contract and the damages.

1. The rules which must be applied in considering the first ground of remoteness were settled in the case of *Hadley* v. *Baxendale* (*k*). Here the plaintiff, who was a mill-owner, delivered to the defendant, who was a carrier, a broken mill shaft to be carried to an engineer as a model for a new shaft. Delivery was delayed, the mill was in consequence stopped, and the plaintiff brought an action for loss of profits through the stoppage. It was, however, held that he could not recover them because (i) such consequences would not ordinarily arise from delay in carrying a shaft, and (ii) he had not communicated to the defendant the special circumstances making these consequences possible. Two general rules were also laid down by the Court for determining the extent of a defendant's liability in an action for breach of contract:—

(a) The defendant is always liable for such damages as may fairly and reasonably be considered to arise "naturally, *i.e.*, according to the usual course of things," from the breach.

(b) The defendant is also liable for such further damages "as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach."

These two rules are explained as follows, in the leading case and subsequent cases (*l*). "The damages must be such as arise

(*i*) Where final judgment has been obtained, and the damages are merely a matter of calculation, they may be referred for assessment to one of the masters of the Court or to an official or special referee. Where damages are to be assessed in respect of a continuing cause of action, they are in all cases calculated down to the date of the assessment (Order XXXVI. rule 58).

(*k*) 9 Ex. 341; 34 L. J. Ex. 179.

(*l*) See, particularly, *Hammond* v. *Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58.

out of the *contract* and are not extraneous to it" (*m*). "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract" (*n*). Accordingly, in ordinary circumstances, the defendant is responsible only for ordinary consequences, and is liable only for such special damages as are a probable result of the breach of a contract of the particular kind. The same rule applies if, though special circumstances exist, they are not communicated to the defendant. But, if the contract is made *on the basis* of special circumstances which may entail special consequences, the defendant is liable for such additional damages as may reasonably be supposed to have been in his contemplation as the probable result of a breach of the particular contract in the special circumstances. Whether or not a defendant is liable for such additional damages depends in every case upon whether the situation was so disclosed to him by the plaintiff at the time of making the contract as to render it a fair inference of fact that the defendant intended to contract with reference to the special circumstances and to be liable for a breach under those circumstances (*o*).

Thus, in the absence of any special contract, a carrier only contracts to deliver goods within a reasonable time and, if he fails to do so, is liable only for the difference between the market price at the date of delivery and the date when they ought to have been delivered (*p*). But if a carrier accepts goods for delivery at a particular place and time, knowing the particular purpose for which the goods are sent, he is liable for any loss of profits caused by delay in delivery (*q*). So also, in

(*m*) *Chaplin* v. *Hicks*, [1911] 2 K. B., at p. 795; 80 L. J. K. B. 1292.

(*n*) *Grébert Borgnis* v. *Nugent*, 15 Q. B. D., at p. 92; 54 L. J. Q. B. 511.

(*o*) *Grébert Borgnis* v. *Nugent*, 15 Q. B. D., at pp. 89, 93; *Chaplin* v. *Hicks*, [1911] 2 K. B., at p. 794; *Weld Blundell* v. *Stevens*, [1920] A. C., at p. 979; 89 L. J. K. B. 705; 123 L. T. 593. Knowledge of special circumstances is not in itself sufficient to render the defendant liable, but is *evidence* of an understanding by *both parties* that the contract is based upon the circumstances which are communicated (*British Columbia Saw Mill Co.* v. *Nettleship*, L. R. 3 C. P., at p. 509; 37 L. J. C. P. 235; 18 L. T. 604).

(*p*) *Horne* v. *Midland Railway*, L. R. 8 C. P. 131; 42 L. J. C. P. 59; 28 L. T. 312.

(*q*) *Simpson* v. *London and North Western Railway*, 1 Q. B. D. 274; 45 L. J. Q. B. 182; 33 L. T. 805. Here the defendant accepted goods for delivery at a show, knowing the particular purpose for which they were sent. In the case cited in the last note the defendant accepted goods for delivery, knowing

an action against a vendor of goods for non-delivery or for breach of warranty of quality the defendant is, in ordinary circumstances, liable only for the difference between the contract price and the market price at the date of the breach (*r*), so that any sub-contract made by the purchaser will not be taken into account (*s*). But if to the knowledge of the vendor, the contract was made in order to enable the purchaser to carry out some special purpose, as *e.g.*, to fulfil a sub-contract of sale, he may be liable for damages caused by the failure of that purpose (*t*). Similarly, where a carrier of passengers is guilty of unreasonable delay, a passenger may recover the amount of expenses *reasonably* incurred, such as hotel expenses or the cost of procuring a conveyance to continue his journey (*u*).

2. The second ground of remoteness depends upon the maxim *In jure non remota causa, sed proxima spectatur*, a principle which applies both to contracts and to torts (*x*). In order to make the defendant responsible, the damages must be the "direct

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that if they were late they would be returned to the sender by the person who had contracted to purchase them, but not knowing that the damages would be, as they were in fact, in excess of the difference between the contract price and the market price at the date of the delivery.

(*r*) Sale of Goods Act, 1893, ss. 51, 53, *post*, Part II., Chapter IV.

(*s*) This rule applies not only to prevent the damages from being increased, but also to prevent them from being decreased. Thus, where in an action for breach of warranty of quality the plaintiffs have accepted part of the goods complained of, and resold them at a price *higher* than the market price at the date of delivery, this cannot be taken into account in mitigation of damages (*Slater* v. *Hoyle & Smith, Ltd.*, [1920] 2 K. B. 11; 89 L. J. K. B. 401; 122 L. T. 611; 36 T. L. R. 132). But where goods are accepted after a delay in delivery, and are sold by the purchaser, he is only entitled to recover the difference between the market price at the proper date of delivery and the price which he actually obtained (*Wertheim* v. *Chicoutimi Pulp Co.*, [1911] A. C. 301; 80 L. J. P. C. 91; 104 L. T. 226; approved in *Williams Bros.* v. *Agius, Ltd.*, [1914] A. C., at p. 522; 83 L. J. K. B. 715; 110 L. T. 865; 34 T. L. R. 851).

(*t*) *Hydraulic Engineering Co.* v. *McHaffie*, 4 Q. B. D. 670; *Hammond* v. *Bussey*, 20 Q. B. D. 79; 57 L. J. Q. B. 58. The damages may in such a case include the costs of reasonably defending an action brought against the purchaser by the sub-purchaser (*Hammond* v. *Bussey; Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413; 68 L. J. Q. B. 312; 80 L. T. 140).

(*u*) *Hamlin* v. *Great Northern Railway*, 1 H. & N. 408; 26 L. J. Ex. 20; *Le Blanche* v. *London and North Western Railway*, 1 C. P. D. 286; 34 L. T. 667.

(*x*) *Cobb* v. *Great Western Railway*, [1893] 1 Q. B., at p. 464; 62 L. J. Q. B. 335; affirmed, [1894] A. C. 419; 63 L. J. Q. B. 629; 71 L. T. 161; *The London*, [1914] P., at p. 77; 83 L. J. P. 74; 109 L. T. 960; 30 T. L. R. 196.

and natural" consequences of the breach (*y*), that is to say, there must be a "direct and natural causal sequence" (*z*) between the breach and the damages. A defendant is not liable for damages which are connected with the breach merely by a series of independent causes (*a*). Thus, if a railway company upsets a passenger and breaks his leg, the damage is direct; if in breach of contract it takes him to the wrong station and, in order to get home, he takes a cab, which upsets him and breaks his leg, the damage is too remote, because, though the breach was a *causa sine qua non* of the damage, it was not the *causa causans* or proximate cause (*b*). Conversely, however, if the breach produces a continuous effect, which is the "primary and substantial" cause of the damage, the defendant is responsible, although the immediate *causa sine qua non* was some intervening fact or even the act of a third person (*c*). Thus, where through the defendant's act, cattle which were in the charge of drovers ran away, and through the deficiency of a fence got on a railway line, where they were killed by a train, it was held that the defendant was responsible, because everything which happened to the cattle was directly due to the loss of control which was caused by the defendant's act (*d*).

Liquidated damages.—A contract may provide that, upon breach of some or any of its terms, the party in default shall pay a sum fixed by the contract. If that sum is really liquidated

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(*y*) *Cobb* v. *Great Western Railway* (*ubi supra*). Various phrases that have been used to describe such consequences as are not too remote are collected in [1914] P., at p. 77.

(*z*) *Dulieu* v. *White & Sons*, [1901] 2 K. B., at p. 678; 70 L. J. K. B. 837; 85 L. T. 186; 17 T. L. R. 555.

(*a*) *Hobbs* v. *London and South Western Railway*, L. R. 10 Q. B., at pp. 117, 118; 44 L. J. Q. B. 49; 32 L. T. 352.

(*b*) The illustrations in the text are taken from *Hobbs* v. *London and South Western Railway* (*ubi supra*). A similar illustration is given in *Chaplin* v. *Hicks*, [1911] 2 K. B., at p. 794; 80 L. J. K. B. 1292. For the expressions *causa causans* and *causa sine qua non*, see *Burton* v. *Pinkerton*, L. R. 2 Ex., at p. 350; 36 L. J. Ex. 340; 17 L. T. 15; *Romney Marsh Bailiffs* v. *Trinity House Corporation*, L. R. 5 Ex., at p. 208; affirmed, L. R. 7 Ex. 247; 41 L. J. Ex. 106; *Farquharson Brothers* v. *King*, [1902] A. C., at p. 339; 71 L. J. K. B. 667; 85 L. T. 264; 18 T. L. R. 665.

(*c*) *The London*, [1914] P., at pp. 80, 81; 83 L. J. P. 74; and see *De la Bere* v. *Pearson, Ltd.*, [1907] 1 K. B. 483; 76 L. J. K. B. 309; 96 L. T. 425; 23 T. L. R. 264; affirmed, 24 T. L. R. 120.

(*d*) *Sneesby* v. *Lancashire and Yorkshire Railway*, 1 Q. B. D. 42; 45 L. J. Q. B. 1; 33 L. T. 372.

damages it becomes, on breach, a debt due from the defendant to the plaintiff and can be recovered in full: if, however, it is merely a penalty to secure the payment of money by the defendant, the plaintiff can recover only the sum which ought to have been paid, together with interest (*e*); and, if it is a penalty to secure performance of some act other than the payment of money, the plaintiff can recover only his actual damages, which will be assessed in the ordinary way (*f*).

In a recent case (*g*), the following rules were settled for distinguishing a penalty for liquidated damages:—

1. Though parties who use the words "penalty" or "liquidated damages" may, *prima facie*, be supposed to mean what they say, yet the expression used is not conclusive; the Court must find out whether the payment is in truth a penalty or liquidated damages.

2. The essence of a penalty is a payment stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

3. The question whether the sum is a penalty or liquidated damages is a question of *construction*, to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract.

4. To assist this task of construction, various tests have been suggested. Such are:—

i. It will be held to be a penalty if the sum is extravagant

(*e*) *Heynes* v. *Dixon*, [1900] 2 Ch. 561; 69 L. J. Ch. 689; 83 L. T. 129. In the case of a common money bond with a penalty (as *e.g.*, where A borrows £100 from B, but gives a bond to repay £200, with a proviso that it shall be void if, on the day named, he repays £100 with interest) this rule is statutory by 4 & 5 Anne, c. 16, ss. 12, 13, and accordingly no sum can be recovered in excess of the principal sum of £100 and interest due.

(*f*) *Heynes* v. *Dixon* (*ubi supra*). Bonds other than common bonds are governed by 8 & 9 Will. 3, c. 11, s. 8, which provides that in any action for a penalty for non-performance of a covenant contained in any deed or written instrument, the plaintiff must *assign*, or set out, the breaches of which he complains, and the damages must be assessed by a jury. Judgment may be entered for the whole penalty but execution can be issued only for the assessed damages and costs, the judgment, however, remaining as a security against further breaches: *Preston* v. *Dania*, L. R. 8 Ex. 19; 42 L. J. Ex. 33; 27 L. T. 612; see also Order XIII., r. 14.

(*g*) *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co., Ltd.*, [1915] A. C. 9; 83 L. J. K. B. 1574; 111 L. T. 862; 30 T. L. R. 625 (reviewing the authorities).

in comparison with the greatest loss that could possibly follow the breach.

ii. It will be held to be a penalty if the breach consists only in not paying a sum of money and the sum stipulated is greater than the sum which ought to have been paid.

iii. There is a presumption (but no more) that it is a penalty when a single lump sum is made payable on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.

iv. It is no obstacle to the sum stipulated being a geninue pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility; that is just the situation when it is possible that pre-estimated damage was the bargain between the parties.

Equitable Remedies.—Common Law remedies are obtainable as of right, but equitable remedies are discretionary and may be refused for reasons which would have no operation at Common Law, as, *e.g.*, because the plaintiff has, by his conduct, disentitled himself from relief or because the remedy which he claims would be a great hardship for the defendant (*h*). The remedies of specific performance and injunction were granted by the Court of Chancery only when the Common Law remedy of damages was inadequate: after the *Judicature Act*, 1873, they might be granted by any Division of the High Court, but, in granting or refusing them, the Court must have regard to equitable principles (*i*).

Specific performance (*k*).—This remedy was, in Equity considered particularly appropriate to contracts for the selling and letting of land, and was not granted to enforce contracts for the sale of goods which could be procured in the open market, though

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(*h*) See Wilshere's Equity, Chapter I.

(*i*) *Ante*, pp. 2, 3. By s. 34 of the Judicature Act (now re-enacted by s. 56 of the Supreme Court of Judicature (Consolidation) Act, 1925), actions for specific performance of contracts for selling or letting land were assigned to the Chancery Division.

(*k*) See Wilshere's Equity, Chapter XIII.

it might be decreed in the case of goods which had some particular quality or characteristic (*l*); so, also, it was not granted to enforce contracts relating to personal services or involving a series of continuous acts, the performance of which the Court could not effectively superintend (*m*). It was also refused (i) where there was an absence of mutuality (*n*); and (ii) where, although the contract was under seal, it was not made for valuable consideration.

Injunction (*o*).—An injunction is granted only to restrain the breach of a *negative contract*, and for this purpose is a remedy analogous to that of specific performance, so that its grant is governed by most of the same rules (*p*). As a general rule, if the contract is negative in substance, it is not necessary that it should contain an express negative stipulation (*q*). But where the contract is one to which the remedy of specific performance is not applicable, *e.g.*, a contract for personal services, its breach will not be restrained by injunction unless there is an express negative stipulation severable from the affirmative stipulations. Thus, in the case of *Lumley* v. *Wagner*, the defendant agreed to sing at the plaintiff's theatre during a certain time, and not to sing elsewhere during that time. It was held that, though the Court could not enforce specific performance of the contract

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(*l*) Now, however, by s. 52 of the Sale of Goods Act, 1893 (*post*, Part II., Chapter IV.), a contract for the sale of specific goods may be specifically enforced. A decree for specific performance of a *contract* for the sale of goods of exceptional quality must be distinguished from a decree for the *specific delivery* of a chattel which might be granted in case of the inadequacy of the common law action for detinue, under which the defendant could, on payment of their value, retain goods claimed by the plaintiff (*ante*, p. 5).

(*m*) As a general rule, specific performance of building contracts will not be ordered. The conditions under which it may be decreed are laid down in *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515; 70 L. J. K. B. 429; 84 L. T. 407; 17 T. L. R. 234. So also, specific performance of a contract to lend money is not enforced; but by s. 105 of the Companies (Consolidation) Act, 1908, a contract to take debentures of a company may be specifically enforced.

(*n*) *E.g.*, where the plaintiff is an infant and the contract could not be enforced *against* him.

(*o*) See Wilshere's Equity, Chapter XIV.

(*p*) *Doherty* v. *Allman*, 3 A. C. 709; 39 L. T. 129.

(*q*) See *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*, [1901] 2 Ch. 37; 70 L. J. Ch. 468; 84 L. T. 436; 17 T. L. R. 410; *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799; 70 L. J. Ch. 862; 84 L. T. 818; 17 T. L. R. 435.

to sing at the theatre, it would restrain the violation of the express stipulation not to sing elsewhere (*r*).

Where a negative contract provides for the payment of liquidated damages in case of breach, the plaintiff cannot claim an injunction as well as damages, but must elect between the two remedies (*s*).

(*r*) 21 L. J. Ch. 898; 91 R. R. 193; 1 De G. M. & G. 604. See also *Rely-a-Bell Burglar Alarm Co.* v. *Eisler*, [1926] 1 Ch. 609; 95 L. J. Ch. 345; 135 L. T. 268. This doctrine will not be extended. See *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; *Davis* v. *Foreman*, [1894] 3 Ch. 654; 64 L. J. Ch. 187; *Kirchner & Co.* v. *Gruban*, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932; *Mortimer* v. *Beckett*, [1920] 1 Ch. 571; 89 L. J. Ch. 245; 123 L. T. 27.

(*s*) *General Accident Assurance Corporation* v. *Noel*, [1902] 1 K. B. 377; 71 L. J. K. B. 236; 86 L. T. 555; 18 T. L. R. 164.

PART II.

PARTICULAR CONTRACTS.

CHAPTER I.

PRINCIPAL AND AGENT. MASTER AND SERVANT.

It is impossible to give any precise definitions which apply to all classes of agents or servants, or which completely distinguish an agent from a servant. The essence, however, of agency is that one person is authorised to act on behalf of another, whose *representative* he is to be and in whom are to vest all rights and liabilities arising from his transactions as agent. The term "servant," on the other hand, applies to a person who, as a mere instrument for the performance of some particular work, gives some definite time and labour to (*a*), and is under the control and bound to obey the orders of, his employer (*b*). Thus the relationship of master and coachman does not of itself create agency, because a coachman is not employed to represent his master, but merely to perform certain specific work (*c*). Conversely, a mere agent may not be bound to give any time or labour to his principal, as, *e.g.*, where there is a contract that he shall be paid commission on work done by him, but no contract binding him to do any work (*d*). But service and agency may co-exist in the same person, as, for example, if a servant is authorised to make a contract on behalf of his master (*e*).

The first section of this chapter relates to contracts entered

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(*a*) *R.* v. *Walker*, Dears. & B. C. C. 600.

(*b*) *R.* v. *Negus*, L. R. 2 C. C. R., at p. 35; 42 L. J. M. C. 62; 28 L. T. 646. "The greater the amount of direct control exercised over the person rendering the services by the person contracting for them, the stronger [are] the grounds for holding it to be a contract of service." See *Simmons* v. *Heath Laundry*, [1910] 1 K. B., at pp. 549, 550; 79 L. J. K. B. 395; 102 L. T. 210; 26 T. L. R. 326.

(*c*) See *Wright* v. *Glyn*, [1902] 1 K. B. 475; 71 L. J. K. B. 497; 86 L. T. 373.

(*d*) See *Levy* v. *Goldhill*, [1917] 2 Ch., at p. 303; 86 L. J. Ch. 693; 117 L. T. 442; 33 T. L. R. 479.

(*e*) See *Maunder* v. *Conyers*, 2 Stark. 281.

into by an agent on behalf of, and with the authority of, a principal who, by virtue of the maxim *Qui facit per alium facit per se*, becomes liable upon and can enforce such contracts. The second section of the chapter contains the principal rules governing the relationship of master and servant.

Section 1.—*Principal and Agent.*

The Creation of Agency.—As between principal and agent, a contract of agency, like any other contract, can exist only by *mutual assent* (*f*), except in the case of *agency of necessity* (*g*). Such assent may be given expressly, or may be inferred or implied from the conduct or situation of the parties. Thus, at a sale by auction, the auctioneer is an agent for the purpose of signing the contract of sale on behalf of the highest bidder so as to satisfy s. 4 of the Statute of Frauds, or s. 40 of the Law of Property Act, 1925, or s. 4 of the Sale of Goods Act, 1893, the assent of the bidder being implied from his conduct in bidding (*h*). Moreover, the assent of the principal may be given by his *subsequent ratification* of an act done on his behalf (*i*); and although there is no contract of agency, one person may be liable as principal for the acts of another whom he *holds out* as having authority to act on his behalf (*k*), or whose authority he is for any reason estopped from denying.

An express contract of agency may be in any *form*—unless in a particular instance it must comply with some special requirement of a statute (*l*) or of the Common Law (*m*).

(*f*) *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; *Pole* v. *Leask*, 33 L. J. Ch. 155; 8 L. T. 645.

(*g*) *Post*, p. 228.

(*h*) *Emmerson* v. *Heelis*, 2 Taunt. 38; 11 R. R. 520; *Bell* v. *Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 13 T. L. R. 274; see also *ante*, p. 82, note (*w*).

(*i*) *Post*, p. 229.

(*k*) *Drew* v. *Nunn*, 4 Q. B. D., at p. 667; 48 L. J. Q. B. 591; 40 L. T. 671.

(*l*) As *e.g.*, under s. 4 of the Statute of Frauds, or s. 40 of the Law of Property Act, or s. 4 of the Sale of Goods Act, 1893 (*ante*, p. 68). But an agent need not have authority in writing merely because a contract to be made between him and a third person comes within these sections (*Coles* v. *Trecothick*, 9 Ves. Jun. 234; 7 R. R. 167; *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884; *Heard* v. *Pilley*, L. R. 4 Ch. 458; 38 L. J. Ch. 718; 21 L. T. 68.

(*m*) As *e.g.*, in some contracts of corporations (*ante*, p. 30), and where the agent is appointed to execute a deed (*post*, p. 223).

The *capacity* of a person to enter into a contract of agency, whether as principal or agent, depends upon his general capacity to contract (*n*). As regards third persons, the act of an agent is deemed to be the act of his principal, and accordingly a person with no general capacity to make a contract of agency (as, *e.g.*, an infant) is liable for contracts made on his behalf by an agent only to the same extent as if they had been made by himself personally (*o*). The incapacity of an agent to contract on his own account is immaterial, except as regards his liability either to his principal or to third persons; the infancy of an agent will not, for example, affect the validity of a contract made by him on behalf of his principal (*p*).

One person may act as agent for both parties to a contract, as, *e.g.*, in the case of contracts made through a broker and sales by auction.

What may be done by means of an agent.—The general rule is that a person who is *sui juris* can appoint an agent to do anything which he himself has the capacity to do (*q*). Thus, where a statute requires a person's signature, it is sufficient if his name is signed by his agent, unless the statute expressly or by implication requires his personal signature (*r*).

This general rule is, however, qualified by the maxim *Delegatus non potest delegare*, which prevents the delegation of powers and duties of a confidential and personal nature. Thus a trustee may not delegate to anyone else the performance of his duties, unless such delegation is expressly permitted by the provisions of the trust, or is a moral necessity from the usages of

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(*n*) *Drew* v. *Nunn*, 4 Q. B. D., at p. 66; 48 L. J. Q. B. 591; 40 L. T. 671; *Oliver* v. *Woodroffe*, 4 M. & W. 650; 8 L. J. Ex. 105; *Daily Telegraph* v. *M'Laughlin*, [1904] A. C. 776; 91 L. T. 233; 20 T. L. R. 674.

(*o*) See *Helps* v. *Clayton*, 17 C. B. (N.S.) 553; 34 L. J. C. P. 1; 11 L. T. 476; 142 R. R. 513.

(*p*) *Re d'Angibau*, 15 Ch. D., at p. 246; 49 L. J. Ch. 756; 43 L. T. 135.

(*q*) *Jackson & Co.* v. *Napper*, 35 Ch. D., at pp. 172, 173; 56 L. J. Ch. 406; 55 L. T. 836; 3 T. L. R. 238; *Bevan* v. *Webb*, [1901] 2 Ch., at p. 77; 70 L. J. Ch. 536; 84 L. T. 609; 17 T. L. R. 440.

(*r*) Thus it has been held that signature by an agent is sufficient for (i) the execution of a bill of sale (*Furnivall* v. *Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378); (ii) subscription to a memorandum of association (*Re Whitley Partners*, 32 Ch. D. 337; 55 L. J. Ch. 540; 54 L. T. 912; 2 T. L. R. 541); (iii) the execution of a deed of arrangement (*Re Wilson*, [1916] 1 K. B. 382; 85 L. J. K. B. 329).

mankind, or is to a purely ministerial agent (*s*). Similarly an agent may not, as a rule, delegate his agency to a sub-agent (*t*).

Relations between Agent and Principal.

1. Where there is a valid and enforceable *contract* of agency, an agent who fails to perform it is liable in damages for breach of contract; but in the absence of a contract under seal or for valuable consideration a person who undertakes an agency is not liable for mere nonfeasance (*u*), though if he does in any way act as agent he is liable to his principal for any breach of duty or negligence in the execution of the agency (*x*).

2. In executing his agency every agent is bound to obey the express instructions of his principal (*y*), provided that they are lawful (*z*) and such as his principal has power to give. On failure to do so he is liable for any damage caused by his disobedience, irrespective of whether he has in fact been guilty of negligence (*a*). Conversely, however, if he is clearly authorised to do an act which is imprudent, he is not liable for loss thereby occasioned to his principal (*b*); and if his authority is given in such ambiguous terms as to be reasonably capable of more than one construction, and he acts in good faith upon one of the constructions of which it is capable, his principal will be bound with respect both to the agent and to third persons, although it was not the construction intended by him (*c*).

3. Subject to any express instructions of the principal, the

(*s*) *Speight* v. *Gaunt*, 9 A. C. 81; 53 L. J. Ch. 419; 50 L. T. 330; *Re Brier*, 26 Ch. D. 238; *Jobson* v. *Palmer*, [1893] 1 Ch. 71; 62 L. J. Ch. 180; 67 L. T. 797. See also ss. 23-25 of the Trustee Act, 1925.

(*t*) *Post*, p. 214.

(*u*) *Turpin* v. *Bilton*, 5 M. & G. 455; 12 L. J. C. P. 167.

(*x*) *Balfe* v. *West*, 13 C. B. 466; 22 L. J. C. P. 175; 93 R. R. 620.

(*y*) *Smart* v. *Sandars*, 3 C. B. 380; 15 L. J. C. P. 39; 71 R. R. 384; 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 849; *Fray* v. *Voules*, 1 E. & E. 839; 28 L. J. Q. B. 232; 117 R. R. 483.

(*z*) *Webster* v. *De Tastet*, 7 T. R. 157; 4 R. R. 402; *Bexwell* v. *Christie*, Cowp. 395.

(*a*) *Stearine, etc., Co.* v. *Heintzmann*, 17 C. B. (N.S.) 56; 11 L. T. 272; 112 R. R. 245; *Lilley* v. *Doubleday*, 7 Q. B. D. 510; 51 L. J. Q. B. 310; 44 L. T. 814; *The Hermione*, [1922] P. 162; 91 L. J. P. 136; 126 L. T. 701; 38 T. L. R. 381.

(*b*) *Overend, Gurney & Co.* v. *Gibb*, L. R. 5 H. L. 480; 42 L. J. Ch. 67.

(*c*) *Ireland* v. *Livingston*, L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79; *Gould* v. *S. E. Railway Co.*, [1920] 2 K. B. 186; 89 L. J. K. B. 700; 123 L. T. 256.

following powers and duties are impliedly conferred and imposed upon every agent—(i) that he shall have power to act, and shall act, in accordance with the ordinary course of business (*d*) and according to the general practice and usage of the particular business in which he is engaged, unless such practice or usage is either illegal (*e*) or is unreasonable and was unknown to the principal at the time of entering into the contract of agency (*f*); (ii) that he shall have authority to do, and shall do, whatever is necessary for, or ordinarily incidental to, the execution of his agency (*g*); (iii) that in all matters which are left to his discretion he shall act with the most complete good faith and, to the best of his judgment, solely for the benefit of his principal (*h*).

If an agent is guilty of a breach of any of these duties, he is liable for any loss or damage thereby occasioned to his principal. Thus an agent who is employed to receive payment of a debt has *prima facie* authority to receive it only in cash, and not by a bill of exchange or cheque, or by a settlement of accounts between himself and the debtor (*i*); if, therefore, an agent, without express authority and in the absence of any general usage to do so, accepts in payment of a debt a bill of exchange or cheque which is subsequently dishonoured, he is liable for any loss thus caused to his principal (*k*).

4. An agent must keep proper accounts of all his dealings on behalf of his principal (*l*), and on failure to do so is liable to

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(*d*) " A person who authorises another to contract for him, authorises him to make that contract in the usual way " : *Bayliffe* v. *Butterworth*, 1 Ex., at p. 428.

(*e*) *Hodgkinson* v. *Kelly*, L. R. 6 Eq., at p. 502; 37 L. J. Ch. 837.

(*f*) See *Blackburn* v. *Mason*, 68 L. T. 510; 9 T. L. R. 286; *Robinson* v. *Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544. Any custom is unreasonable which changes the nature of the contract by allowing an agent to turn himself into a principal (*Robinson* v. *Mollett*, *ubi supra*). And no evidence can be admitted of a custom which is inconsistent with the express terms of a written contract (see *Miller, Gibb & Co.* v. *Tyrer*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259; 116 L. T. 753). As to the custom to disregard Leeman's Act, see *ante*, p. 129.

(*g*) *Dingle* v. *Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 143; 121 R. R. 424; and see, further, *post*, p. 223.

(*h*) *Smart* v. *Sandars*, 3 C. B., at p. 399; 71 R. R. 384; 15 L. J. C. P. 39; *Heath* v. *Parkinson*, 42 T. L. R. 693.

(*i*) *Sweeting* v. *Pearce*, 7 C. B. (N.S.) 449; 29 L. J. C. P. 265; 121 R. R. 584; *Williams* v. *Evans*, L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; 13 L. T. 573; *Pape* v. *Westacott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18.

(*k*) *Pape* v. *Westacott* (*ubi supra*).

(*l*) *Clarke* v. *Tipping*, 9 Beav. 384; 73 R. R. 355.

an action of account (*m*). He must also on request produce to his principal, or to any proper and suitable person authorised by his principal, all accounts and documents in his hands relating to his principal's business (*n*). And he must keep the money and property of his principal separate from his own (*o*); if he mixes his own money or property with that of his principal, so that they cannot be distinguished, it will be assumed against him that the whole belongs to his principal (*p*).

5. An agent must upon request pay over to his principal all money received on his behalf, although the contract or transaction in respect of which it was received was void (*q*) or illegal (*r*), and upon failure to do so is liable to an action for money had and received (*s*); but it is otherwise if the contract of agency is unlawful (*t*), or if the receipt of the money was illegal (*u*). If, however, money has been obtained by an agent wrongfully, or in such circumstances that he is bound to return it and he does return it, he is not liable in respect thereof to his principal (*x*).

6. An agent must, in the execution of his agency, act with proper skill, care, and diligence. If he is acting gratuitously, he is liable only for failure to use reasonable care and such skill as he has. But a person who holds himself out for employment

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(*m*) *Harsant* v. *Blaine*, 56 L. J. Q. B. 511; 3 T. L. R. 689. If he does not render a proper account he may lose his commission (*Gray* v. *Haig*, 20 Beav. 219; *White* v. *Lincoln*, 8 Ves. 363; but see *Re Lee*, L. R. 4 Ch. 43; 19 L. T. 435).

(*n*) *Dadswell* v. *Jacobs*, 34 Ch. D. 278; 56 L. J. Ch. 233; 55 L. T. 857. *Held*, however, that a clerk in a rival and unfriendly business was not a proper person.

(*o*) *Clarke* v. *Tipping* (*ubi supra*).

(*p*) *Lupton* v. *White*, 15 Ves. 432; *Cook* v. *Addison*, 7 Eq. 466; 38 L. J. Ch. 322; 20 L. T. 212. If he pays his principal's money into his own account at a bank, he is liable for the full amount on failure of the bank (*Massey* v. *Banner*, 1 Jac. & W. 241; *Wren* v. *Kirton*, 11 Ves. 377; 8 R. R. 174; *Robinson* v. *Ward*, 2 C. & P. 59).

(*q*) *Bridger* v. *Savage*, 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 1 T. L. R. 585; *De Mattos* v. *Benjamin*, 63 L. J. Q. B. 248; 70 L. T. 560; 10 T. L. R. 221; see also *ante*, p. 124.

(*r*) *Bousfield* v. *Wilson*, 16 M. & W. 185; 16 L. J. Ex. 44; *Tenant* v. *Elliott*, 1 B. & P. 3; 4 R. R. 755; *Farmer* v. *Russell*, 1 B. & P. 296.

(*s*) *Harsant* v. *Blaine*, 56 L. J. Q. B. 511; 3 T. L. R. 689.

(*t*) *Thomson* v. *Thomson*, 7 Ves. 470; 6 R. R. 151.

(*u*) *Nicholson* v. *Gooch*, 5 E. & B. 999; 25 L. J. Q. B. 137; 26 L. T. (o.s.) 258.

(*x*) *Murray* v. *Mann*, 2 Exch. 538; 17 L. J. Ex. 256; 76 R. R. 686; *Stevens* v. *Lee*, 2 C. L. R. 251; 22 L. T. (o.s.) 84.

for reward in any capacity is bound, not only to exercise reasonable care, but to *possess* and exercise reasonable skill (*y*).

7. As a general rule, the principle *Delegatus non potest delegare* prevents an agent from delegating his duties or powers without the consent of his principal, except for such purely ministerial acts as, in the ordinary course of business, are usually done by a clerk or servant (*z*). The consent of the principal may, however, be inferred where, from the conduct of the parties, the usage of trade, or the nature of the particular business, it may reasonably be presumed that such authority should exist, or when, in the course of the employment, emergencies arise which impose upon the agent a necessity for delegation (*a*). But even though an agent is not guilty of a breach of duty in delegating his powers, he cannot establish privity of contract between the sub-agent and his own principal unless he has authority to do so (*b*); and in the absence of such authority, or of subsequent ratification of the agent's acts (*c*), the original principal incurs no liability to, and has no rights against, the sub-agent, who, for his part, can look to, and is liable to, only the agent who appointed him (*d*). An agent who employs a sub-agent is always (*e*) liable to his principal for any money received by the sub-agent on behalf of his principal, and is responsible for any damage caused to his principal by the sub-agent's negligence or breach of duty (*f*).

(*y*) See *post*, Part III., Chapter III.

(*z*) *Lord* v. *Hall*, 2 C. & K. 698; *Ex p. Birmingham Banking Co.*, L. R. 3 Ch. 651.

(*a*) *De Bussche* v. *Alt*, 8 Ch. D., at pp. 310, 311; 47 L. J. Ch. 381.

(*b*) *New Zealand Land Co.* v. *Watson*, 7 Q. B. D. 354; 50 L. J. Q. B. 433; 44 L. T. 675; *Hampton* v. *Glamorgan County Council*, [1917] A. C. 13; 86 L. J. K. B. 106; 115 L. T. 726; 33 T. L. R. 58.

(*c*) *Mason* v. *Clifton*, 3 F. & F. 899; *Keay* v. *Fenwick*, 1 C. P. D. 745.

(*d*) See *Cull* v. *Backhouse*, 6 Taunt. 149; *Schmaling* v. *Tomlinson*, 6 Taunt. 147; *Stephens* v. *Badcock*, 3 B. & Ad. 354; 1 L. J. K. B. 75; 37 R. R. 448; *Sims* v. *Brittain*, 4 B. & Ad. 375; *Lockwood* v. *Abdy*, 14 Sim. 437. Nor in the absence of "authority or recognition" is the principal liable for the acts of the sub-agent (*Doe* d. *Rhodes* v. *Robinson*, 3 Bing. N. C. 677; 6 L. J. C. P. 235; see also *Dunlop* v. *De Murrieta & Co.*, 3 T. L. R. 166.

(*e*) *Mackersy* v. *Ramsays Bonars & Co.*, 9 Cl. & Fin., at p. 845; 57 R. R. 183.

(*f*) *Id.*; and see *Skinner* v. *Wequelin*, 1 C. & E. 12; *Swire* v. *Francis*, 3 A. C. 106; 47 L. J. P. C. 18; 37 L. T. 554. But if a sub-agent is in a fiduciary relation to the original principal, he is accountable to the latter for any money received on his behalf (*Powell & Thomas* v. *Evan Jones & Co.*,

8. If an agent turns himself into a principal, and as such enters into any contract with his principal, he is bound to make full disclosure of everything in his knowledge which is material to the transaction (*g*). And if he has an interest in the transaction which may conflict with his duty to his principal, it is not sufficient for him merely to state that he has an interest, but he must disclose the nature and extent of that interest (*h*).

An agent must never put himself in any position in which his interest may conflict with his duty (*i*). Accordingly an agent for the sale of property is not permitted to purchase it himself, nor is an agent for purchase permitted to purchase his own property, unless he has disclosed to his principal all the information in his possession *and* the transaction is a fair one (*k*); it is not sufficient that the transaction is fair if there has been any concealment or non-disclosure (*l*).

Thus A was a grocer, and was also a partner in a firm of sugar refiners. On account of his skill in buying sugar he was accustomed to buy what was required for the firm. He sold to the firm at a fair market price sugar which, while he was a partner, he had bought at a lower price in his private business. It was held that he must account to the firm for the profits which he made by the sale of the sugar (*m*).

In the case of any violation of these rules the principal may rescind the transaction, provided that rescission is still possible (*n*),

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[1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; see also *Collins* v. *Brook*, 5 H. & N. 700; 20 L. J. Ex. 255; 120 R. R. 789).

(*g*) *Gwatkin* v. *Campbell*, 1 Jur. (N.S.) 131; *Davies* v. *London and Provincial Marine Insurance Co.*, 8 Ch. D., at p. 474; 47 L. J. Ch. 511; 38 L. T. 478; *Moody* v. *Cox & Hatt*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; 116 L. T. 740.

(*h*) *Imperial Mercantile Credit Co.* v. *Coleman*, L. R. 6 H. L. 189; 42 L. J. Ch. 644; 36 L. T. 233; *Gluckstein* v. *Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393.

(*i*) *Parker* v. *McKenna*, L. R. 10 Ch., at p. 118; 44 L. J. Ch. 425; 31 L. T. 739; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, [1899] 2 Ch., at p. 442; 68 L. J. Ch. 699; 81 L. T. 834; 15 T. L. R. 436

(*k*) *Demerara Bauxite Co.* v. *Hubbard*, [1923] A. C., at pp. 681, 682; 92 L. J. P. C. 148.

(*l*) *McPherson* v. *Watt*, 3 A. C. 524; *De Bussche* v. *Alt*, 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 380; *Armstrong* v. *Jackson*, [1917] 2 K. B. 882; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444 (reviewing the authorities). No custom can make valid a breach of this rule (*Robinson* v. *Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; see *ante*, p. 212).

(*m*) *Bentley* v. *Craven*, 18 Beav. 75.

(*n*) As to when the right to rescind is lost, see *ante*, pp. 91, 92.

or may affirm it and recover from the agent any profit made by him upon the resale of the property purchased by him or upon the sale of his own property to his principal (*o*).

And, generally, whenever an agent, in or as a result of execution of his agency or from the employment of his principal's property, directly or indirectly makes any profits without the knowledge and sanction of his principal, he must account for them to his principal, and is liable to a Common Law action for money had and received to the use of his principal (*p*); and it is immaterial to consider the fairness of the transaction by which the profits were made, or whether the principal in fact suffered any loss (*q*).

Thus a stockbroker made purchases of shares for a client, who was bound to take delivery and pay for them on August 30. The client having made default, the stockbroker, as he was entitled to do, sold the shares on August 31 on the Stock Exchange at the market price of the day, and charged the client with commission on the sale. As part of the same transaction, the stockbroker bought back the shares from the jobber to whom he had sold them; and through the sale and repurchase being in one bargain obtained them at a lower price than he would otherwise have paid, the jobber being content with a smaller

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(*o*) *Bentley* v. *Craven* (*ubi supra*); *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (*ubi supra*); *Gluckstein* v. *Barnes* (*ubi supra*). Where, however, an agent sells to his principal goods which were his own property before the commencement of the agency, so that he was not in a fiduciary position when he acquired them, rescission is the only remedy (*Re Lady Forrest, etc., Co.*, [1901] 1 Ch. 582; 70 L. J. Ch. 275; 84 L. T. 559; *Burland* v. *Earle*, [1902] A. C. 83; 71 L. J. C. P. 1; 85 L. T. 853; *Cook* v. *Deeks*, [1916] 1 A. C. 554; 85 L. J. P. C. 161; 114 L. T. 636.

(*p*) *Imperial Credit Co.* v. *Coleman* (*ubi supra*); *Parker* v. *McKenna* (*ubi supra*); see also *Morison* v. *Thompson*, L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; 30 L. T. 869; *Williamson* v. *Hine*, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682; 7 T. L. R. 130; *Powell & Thomas* v. *Evan Jones & Co.*, [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430. And if such profits were made directly from property of the principal, of which the agent was bailee, so that they were an accretion to that property, the agent becomes a constructive trustee thereof so that they can be followed into investments made by him; but he is not a constructive trustee, but merely a debtor, in respect of secret profits otherwise made, as, *e.g.*, a secret commission received from another party (*Burdick* v. *Garrick*, L. R. 5 Ch. 233; 39 L. J. Ch. 369; *Lister* v. *Stubbs*, 45 Ch. D. 1; 59 L. J. Ch. 570; 62 L. T. 654; 6 T. L. R. 317).

(*q*) *Parker* v. *McKenna* (*ubi supra*); *Transvaal Lands Co.* v. *New Belgium, etc., Co.*, [1914] 2 Ch. 488; 84 L. J. Ch. 94; 112 L. T. 967; 31 T. L. R. 1.

profit. It was held that, as the broker, in selling the shares, was acting for his client, to whom he had charged commission, and as the advantage that he gained on the repurchase was due to the sale and repurchase being the subject of one bargain, he must account to his client for the difference between the price for which he got the shares and the price which he would otherwise have paid (*r*).

If an agent accepts a bribe or secret commission from a party with whom he is dealing on behalf of his principal, the latter has the following remedies:—

i. He may rescind any contract in respect of which the bribe was given (*s*).

ii. He may refuse to pay the agent any commission in respect of the transaction or recover it if already paid (*t*).

iii. He may recover from the agent or the person paying such bribe or commission the amount thereof, and any further damage which he has sustained in consequence thereof (*u*).

iv. He may dismiss the agent without notice (*x*).

And the agent also incurs a liability to criminal proceedings under the Prevention of Corruption Acts, 1889 to 1916.

(*r*) *Erskine* v. *Sachs*, [1901] 2 K. B. 504; 70 L. J. K. B. 978; 85 L. T. 385.

(*s*) *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11. And it is immaterial to enquire what effect the bribe may have had on the agent's mind (*ibid.*; see also *Alexander* v. *Webber*, [1922] 1 K. B. 642; 91 L. J. K. B. 320).

(*t*) *Price* v. *Metropolitan, etc., Co.*, 28 T. L. R. 630; *Andrews* v. *Ramsay & Co.*, [1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 850. But a principal cannot refuse to pay commission to his agent on transactions in which he has acted honestly merely because there are other cases in which the agent, acting under the same agreement, has acted dishonestly and improperly (*Nitedals Tændstikfabrik* v. *Bruster*, [1906] 2 Ch. 671; 75 L. J. Ch. 798; 22 T. L. R. 724; see also *Hippesley* v. *Knee*, [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5, in which an auctioneer, having charged (i) commission, (ii) out-of-pocket expenses for advertisements, etc., was held not to have forfeited his commission because he obtained a trade discount on advertisements, although he must account to his principal for such discount.

(*u*) *Mayor of Salford* v. *Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; 63 L. T. 658; *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5; *Hovenden* v. *Millhoff*, 83 L. T. 41; 16 T. L. R. 506.

(*x*) *Boston Fishing Co.* v. *Ansell*, 39 Ch. D. 339; 59 L. T. 345.

9. An agent may not publish or divulge any information obtained in the course of confidential employment, or use to his principal's detriment any knowledge surreptitiously obtained during his employment, or employ against his principal materials obtained only for his principal and in the course of his agency (*y*). On this principle a manager of a business has been restrained by injunction from using for his own purposes a list of his late employer's customers secretly copied during his employment (*z*); and a canvasser who had been employed to obtain advertisements for a trade directory, and had for that purpose obtained blocks and other materials, was restrained from using these materials to assist a rival publication (*a*).

Rights of Agent against Principal.—Except where a contract of agency is illegal (*b*) or is within the Gaming Act, 1892 (*c*), an agent may have against his principal the rights (1) to remuneration; (2) to an indemnity; and (3) to a lien.

1. *Remuneration.*—A person who claims to be remunerated for work which, as he alleges, was done by him as an agent must, in the first place, show that he was employed to do that work. If, for example, without any employment by the owner of property, a house agent introduces to him a person who, as a result of that introduction, purchases the property, the house agent is not thereby entitled to a commission (*d*); and, similarly, if an agent is employed merely to let a house, he has no right to commission merely because a person introduced by him as a tenant subsequently buys the house (*e*).

Secondly, a person who claims remuneration as an agent must show a contract or usage to pay remuneration for the work in respect of which he claims it (*f*); and thirdly, he must show

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(*y*) *Amber Size and Chemical Co.* v. *Menzel*, [1913] 2 Ch., at p. 245; 82 L. J. Ch. 573; 109 L. T. 250; 29 T. L. R. 590 (reviewing the authorities).

(*z*) *Robb* v. *Green*, [1895] 2 Q. B. 315; 73 L. T. 15; 11 T. L. R. 517; 64 L. J. Q. B. 593.

(*a*) *Lamb* v. *Evans*, [1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131.

(*b*) *Allkins* v. *Jupe*, 2 C. P. D. 375; 46 L. J. C. P. 824; 36 L. T. 851; *Josephs* v. *Pebrer*, 3 B. & C. 639; 3 L. J. K. B. 102.

(*c*) *Ante*, p. 124.

(*d*) *White* v. *Lucas*, 3 T. L. R. 516.

(*e*) *Toulmin* v. *Millar*, 57 L .J. Q. B. 301; 12 A. C. 746; 58 L. T. 96; 3 T. L. R. 836.

(*f*) *Hall* v. *Gurney*, 2 C. & K. 644.

that all the conditions upon which such remuneration is payable have been fulfilled.

The mere fact that a person is employed as an agent gives him, as a rule, no right to remuneration, unless there is some bargain for remuneration, either express or to be inferred from the circumstances (*g*). If no express stipulation has been made as to his remuneration, but it can be inferred that he was to be remunerated, he is entitled to reasonable remuneration if he does that which he was employed to do (*h*). Where, however, a professional agent, such as an auctioneer or broker, is employed in the ordinary course of his business without any express stipulation as to his remuneration, or the amount thereof, or the conditions upon which it is payable, there is an implied contract by the employer to pay the customary charges (*i*); and in this case the amount of the charges, and the conditions upon which they are payable, will depend upon the custom of the particular business (*k*). Where express provision is made by the contract of agency as to the amount of the agent's remuneration, or the conditions upon which it is to be payable, the rights of the agent with respect thereto must be ascertained exclusively from the terms of the contract (*l*). Evidence of any valid (*m*) custom is admissible to explain the express contract, or to incorporate a provision not inconsistent with its terms (*n*).

Accordingly, if a contract provides that the remuneration of an agent is to be payable only on the happening of a particular event or the accomplishment of a certain result, the agent is not entitled to *any* remuneration until that event has happened or that result has been accomplished. Thus, if it is provided

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(*g*) *Reeve* v. *Reeve*, 1 F. & F. 280; 115 R. R. 911; *Foord* v. *Morley*, 1 F. & F. 496; 115 R. R. 949; *Barnett* v. *Isaacson*, 4 T. L. R. 645.

(*h*) *Taylor* v. *Brewer*, 1 M. & S. 290; 21 R. R. 831; *Jewry* v. *Busk*, 5 Taunt. 302; *Bryant* v. *Flight*, 5 M. & W. 114.

(*i*) *Miller* v. *Beale*, 27 W. R. 403; *Johnson* v. *Kearley*, [1908] 2 K. B., at p. 531; 77 L. J. K. B. 904; 99 L. T. 506; 24 T. L. R. 729.

(*k*) *Turner* v. *Reeve*, 17 T. L. R. 592; *Broad* v. *Thomas*, 7 Bing. 99; 9 L. J. C. P. 32; 33 R. R. 339; *Read* v. *Rann*, 10 B. & C. 438.

(*l*) *Moor Line* v. *Dreyfus*, [1918] 1 K. B. 89; 87 L. J. K. B. 126; 118 L. T. 87.

(*m*) *Gibson* v. *Crick*, 6 L. T. 328; 31 L. J. Ex. 304; 130 R. R. 425; *Curtis* v. *Nixon*, 24 L. T. 706.

(*n*) *Brown* v. *Byrne*, 3 E. & B. 703; 23 L. J. Q. B. 313; 97 R. R. 715; *Affréteurs Réunis* v. *Walford*, [1919] A. C. 801; 88 L. J. K. B. 861; 121 L. T. 393; 35 T. L. R. 542.

that an agent is to receive a specified commission upon the "completion" of a sale (*o*), or if money is obtained upon certain specified terms (*p*) or out of money "obtained" on a sale (*q*), he is neither entitled to recover that commission if the sale is not completed, or if the money is obtained upon other terms, or if no money is obtained as a result of the sale; nor (since the express contract excludes any implied contract (*r*)) can he recover upon a *quantum meruit* for any expenditure of money, time, or skill (*s*).

But, if the conditions upon which the remuneration of the agent was payable have been fulfilled, his right thereto is not lost merely because, without any default on his part, the principal receives no benefit. So, where an agent was to receive commission on "all goods bought" through him, it was held that he was entitled to commission on all orders obtained by him and accepted by his principal, although the latter was unable to execute them and so received no benefit (*t*). And, similarly, whenever an agent is employed to find a lender or purchaser, he is, in general, entitled to commission as soon as he has found a person able and willing to lend or purchase (*u*).

Lastly, where the remuneration of an agent is a commission payable upon transactions brought about by him, it is not sufficient for him to show that some act of his was a *causa sine qua non* of, or afforded an opportunity for, a transaction in respect of which he claims commission, but he must show that he was the *causa causans* or effective cause of such transaction (*x*). Thus, where a house agent was employed to find a purchaser or tenant

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(*o*) *Battams* v. *Tompkins*, 8 T. L. R. 707.

(*p*) *Mason* v. *Clifton*, 3 F. & F. 899; 130 R. R. 907.

(*q*) *Bull* v. *Price*, 7 Bing. 237; *Martin* v. *Tucker*, 1 T. L. R. 655; see also *Knight* v. *Gordon*, 39 T. L. R. 399.

(*r*) *Lott* v. *Outhwaite*, 10 T. L. R. 76.

(*s*) See *Howard* v. *Manx Isles S.C. Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233; 128 L. T. 347; 38 T. L. R. 757 (reviewing the authorities).

(*t*) *Lockwood* v. *Levick*, 8 C. B. (N.S.) 603; 29 L. J. C. P. 340; 125 R. R. 806.

(*u*) *Green* v. *Lucas*, 33 L. T. 584; *Fisher* v. *Drewett*, 48 L. J. Q. B. 32; 39 L. T. 253; *Re Sovereign Life Assurance Co.* (*Salter's Claim*), 8 T. L. R. 602; *Passingham* v. *King*, 14 T. L. R. 392.

(*x*) *Tribe* v. *Taylor*, 1 C. P. D. 505; *Miller & Co.* v. *Radford*, 19 T. L. R. 575; *Nightingale* v. *Parsons*, [1914] 2 K. B. 621; 83 L. J. K. B. 742; 110 L. T. 806; *Howard, Houlder & Partners* v. *Manx S.S. Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233; 128 L. T. 347; 38 T. L. R. 757.

for a house and found a tenant who, after three years' tenancy, purchased the house without any further intervention by the agent, it was held that the original introduction of the tenant was not the *causa causans* of the sale and that the agent was not entitled to commission upon the sale (*y*). But if an agent's introduction is the *causa causans* of a transaction he is entitled to his commission, even though the transaction is not actually completed by him or during his employment as agent (*z*). And an agent may by express agreement be entitled to commission upon transactions which were not even commenced during his employment (*a*). Thus, where an employer agreed to pay commission "upon all orders executed by us and paid for by customers arising from your introduction," it was held that the agent was entitled to commission on orders received after his dismissal. But, *prima facie*, the agent is not entitled to commission after the termination of his employment (*b*).

An agent has no right of remuneration in respect of any services from which, in consequence of his negligence or other breach of duty, the principal receives no benefit (*c*). He may also forfeit it by failure to keep proper accounts (*d*). And, where an agent enters into a transaction in which he has a personal interest in conflict with his duty, the principal is not liable to pay remuneration in respect of such transaction even if he affirms it (*e*).

If a principal, in breach of the contract of agency (*f*), by his

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(*y*) *Nightingale* v. *Parsons* (*ubi supra*); see also *Toulmin* v. *Millar*, 58 L. T. 96 (*ante*, p. 218).

(*z*) *Green* v. *Bartlett*, 14 C. B. (N.S.) 681; 32 L. J. C. P. 261; 8 L. T. 503; *Mansell* v. *Clements*, L. R. 9 C. P. 139; *Burchell* v. *Gowrie*, *etc.*, *Collieries*, [1910] A. C. 614; 80 L. J. P. C. 41; 103 L. T. 325.

(*a*) *Bilbee* v. *Hasse*, 5 T. L. R. 677; see also *Solomon* v. *Brownfield*, 12 T. L. R. 239; *Wilson* v. *Harper*, [1908] 2 Ch. 370; 77 L. J. Ch. 607; 99 L. T. 391; *Levy* v. *Goldhill*, [1917] 2 Ch. 297; 86 L. J. Ch. 693; 117 L. T. 442; 33 T. L. R. 479.

(*b*) *Marshall* v. *Glanvill*, [1917] 2 K. B. 87; 86 L. J. K. B. 767; 116 L. T. 560; 33 T. L. R. 301, and see *Kelly* v. *Croft*, 14 T. L. R. 348; *Barrett* v. *Gilmour*, 17 T. L. R. 292; *Cramb* v. *Goodwin*, 35 T. L. R. 477; *Gerahty* v. *Baines*, 19 T. L. R. 454.

(*c*) *Hamond* v. *Holiday*, 1 C. & P. 384; *Dalton* v. *Irwin*, 4 C. & P. 289; *Hill* v. *Featherstonhaugh*, 7 Bing. 569; 33 R. R. 576.

(*d*) *Ante*, p. 212.

(*e*) *Salomans* v. *Pender*, 3 H. & C. 639; 34 L. J. Ex. 95; 140 R. R. 651.

(*f*) *French & Co., Ltd.* v. *Leeston Shipping Co., Ltd.*, [1922] 1 A. C. 451; 91 L. J. K. B. 655; 127 L. T. 169; 38 T. L. R. 459.

own act or default prevents the agent from earning his remuneration, the agent may maintain an action for *damages*, the measure of which will, in ordinary circumstances, be the amount of the remuneration which the agent would have earned (*g*).

2. *Indemnity.*—An agent is entitled to be indemnified by his principal against all losses, liabilities and expenses incurred by him in executing the orders of his principal (*h*), unless incurred in consequence of some illegal conduct of the agent himself (*i*) or by reason of his own default or breach of duty (*k*).

3. *Lien.*—Every agent has a possessory lien on the goods of his principal in respect of any claims for his remuneration and for expenses, losses and liabilities properly incurred in the course of his agency, unless he received the goods under an express agreement or for a special purpose inconsistent with the right of lien. The lien of an agent is a *particular* lien only, unless by express agreement or custom he has a general lien. Factors, wharfingers, stockbrokers, bankers, solicitors, and, in some cases, insurance brokers, have a general lien (*l*).

Relations between Principal and Third Parties.

Rights of principal against third parties.—The general rule is that a principal may sue in respect of all transactions effected with his authority or subsequently ratified by him, unless his rights are excluded by the terms of a particular contract. This rule applies although the agent contracts personally, or does not disclose the name or existence of his principal, unless, in the latter case, evidence of the existence of a principal would contradict the express terms of the contract. But it does not apply to contracts by deed, nor to bills of exchange, promissory notes and

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(*g*) *Simpson* v. *Lamb*, 17 C. B. 603; 25 L. J. C. P. 113; 104 R. R. 806; *Prickett* v. *Badger*, 1 C. B. (N.S.) 296; 26 L. J. C. P. 33; 107 R. R. 668; *Grogan* v. *Smith*, 8 T. L. R. 132; *Addis* v. *Gramophone Co.*, [1909] A. C. 488; 78 L. J. K. B. 1122; 101 L. T. 466.

(*h*) *Thacker* v. *Hardy*, 11 Q. B. D., at p. 687; 48 L. J. Q. B. 289; 39 L. T. 595; *Re Famatina Corporation*, [1914] 2 Ch., at p. 282; 84 L. J. Ch. 48; 30 T. L. R. 696; *Adams* v. *Morgan & Co.*, [1924] 1 K. B. 751; 93 L. J. K. B. 382; 130 L. T. 792; 40 T. L. R. 70.

(*i*) *Re Parker*, 21 Ch. D. 408; 52 L. J. Ch. 159; 47 L. T. 633.

(*k*) *Johnson* v. *Kearley*, [1908] 2 K. B. 514; 77 L. J. K. B. 904; 99 L. T. 506; 24 T. L. R. 729.

(*l*) For solicitors, see *post*, p. 248, and for the authorities upon the rest of this paragraph, see *post*, Part II., Chapter IV.

cheques, and there are some cases in which the other contracting party may elect whether he will make the principal or the agent liable. These exceptional cases to which the general rule does not apply will be considered later.

Liability of principal to third parties.—A principal is liable to third parties for any transaction effected by another person on his behalf if *either* such person had express or implied authority to effect such transaction on his behalf, *or* he has subsequently ratified the transaction, *or* he is estopped from denying that such person had authority to effect the transaction on his behalf (*m*).

Express authority may, as a rule, be proved either by evidence that it was expressly given or by evidence of acts and conduct from which it may be inferred (*n*). Where, however, an agent executes a deed, express authority by deed must be proved (*o*).

Implied authority.—We have already seen that, subject to his express instructions, every agent has implied authority (i) to do all acts necessary for or incidental to the execution of his agency; and (ii) to follow the ordinary course of business and any reasonable trade usage (*p*). Accordingly, when one person appoints another to act as his agent in any capacity, he gives him an apparent or ostensible authority to do everything within the scope of the authority which, by implication of law, belongs to an agent of that particular character; and while as between the principal and the agent the implied authority of the agent can be limited by the express instructions of the principal, no third person dealing in good faith with the agent is bound by any limitations of the agent's authority of which he had no actual notice, so that, as regards such third persons, the apparent authority is the real authority and binds the principal (*q*).

The scope of the implied or apparent authority of an agent must necessarily vary according to the nature of his agency.

(*m*) See *Paquin, Ltd.* v. *Beauclerk*, [1906] A. C., at p. 166; 75 L. J. K. B. 395; 94 L. T. 350; 22 T. L. R. 395.

(*n*) *Pole* v. *Leask*, 33 L. J. Ch., at p. 156; 8 L. T. 645; 143 R. R. 322.

(*o*) *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L. J. K. B. 184; 29 R. R. 261. But, in the case of partners, it has been held sufficient to bind all if a deed is executed by one in the presence and with the oral authority of the others (*Ball* v. *Dunsterville*, 4 T. R. 313; 2 R. R. 394; *Burn* v. *Burn*, 3 Ves. 578).

(*p*) See *ante*, p. 211, 212.

(*q*) See *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C., at p. 740; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547.

There is, however, an essential distinction between general and particular agents. A *general agent* is an agent who has authority to act for his principal in all matters (when he is sometimes called a universal agent), or in the management of a trade or business carried on by his principal (*r*), or who is employed in the ordinary course of his own business as an agent (*e.g.*, a stockbroker who is employed to buy or sell shares on the Stock Exchange). A *particular agent* is an agent with a limited authority to carry out some particular transaction not in the course of his own business as agent, or to act in some particular capacity not involving any general powers of management (*s*).

Every agent has implied and ostensible authority to do what is usual and necessary (*t*); but no agent has implied or ostensible authority to do what is unnecessary, or, save in certain cases of necessity, what is unusual or outside the apparent scope of his employment.

Thus an agent who has authority to enter into a binding contract has implied authority to sign a memorandum thereof where such memorandum is required by statute (*u*). But, on the other hand, authority to make contracts does not give an agent implied authority to cancel or vary contracts made by him (*x*).

Again, an agent who is employed to find a purchaser for a house has implied authority to describe it and make representations as to its value (*y*), and an agent who is employed to sell a house has implied authority to make a binding contract for its sale (*z*). But an agent who is employed merely to find a purchaser has no implied authority to sign an agreement for

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(*r*) See *Brady* v. *Todd*, 9 C. B. (N.S.) 592; 30 L. J. C. P. 223; 4 L. T. 212; 127 R. R. 797.

(*s*) As, for instance, a stationmaster, see *Cox* v. *Midland Railway*, 3 Ex. 268; 18 L. J. Ex. 65; 77 R. R. 623.

(*t*) *Dingle* v. *Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 143; 121 R. R. 424.

(*u*) *Durrell* v. *Evans*, 1 H. & C. 174; 31 L. J. Ex. 337; 130 R. R. 446; 7 L. T. 97; *North* v. *Loomes*, [1919] 1 Ch. 378; 88 L. J. Ch. 217; 120 L. T. 533; *Koenigsblatt* v. *Sweet*, [1923] 2 Ch. 314; 92 L. J. Ch. 598; 129 L. T. 659; 39 T. L. R. 576. But compare *Smith* v. *Webster*, 3 Ch. D. 49; 45 L. J. Ch. 528; 35 L. T. 44.

(*x*) *Xenos* v. *Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 313.

(*y*) *Mullens* v. *Miller*, 22 Ch. D. 194; 52 L. J. Ch. 380; 48 L. T. 103.

(*z*) *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 568; but see *post*, p. 227, n. (*t*).

sale (*a*). And the servant of a private owner who is instructed on one particular occasion to sell a horse has ordinarily no implied authority to warrant it, a warranty not being necessary for the sale of a horse (*b*); but he has such authority if he is instructed to sell the horse at a fair or market, where it is usual to give a warranty (*c*).

Again, a person who is employed merely in the capacity of a rent collector has no implied authority to receive notice to quit (*d*) or to distrain (*e*). And the local agent of an insurance company, whose duties are merely to receive premiums or proposals, has no implied authority to extend the time for payment of premiums or to contract to grant policies on behalf of the company (*f*). And a *stationmaster*, whose duties relate merely to matters connected with transport, has no implied authority to pledge the credit of a railway company for medical attendance to an injured passenger (*g*).

It should particularly be noted that an agent authorised to sell goods has no implied authority to receive the purchase-money (*h*), and when he is authorised to receive payment he has *prima facie* authority only to receive it in the ordinary course of business and in cash (*i*); and if he has authority to receive payment by cheque, he has no implied authority to pay into his private account cheques made payable to his principal (*k*).

A *general agent* has implied authority to do all acts which are within the authority usually entrusted to an agent of that character.

Accordingly an agent employed to manage a trade or business

(*a*) *Hamer* v. *Sharp*, 19 Eq. 208; 44 L. J. Ch. 53; 31 L. T. 643; *Chadburn* v. *Moore*, 61 L. J. Ch. 674; 67 L. T. 257.

(*b*) *Brady* v. *Todd*, 9 C. B. (N.S.) 592; 30 L. J. C. P. 223; 4 L. T. 212; 127 R. R. 797.

(*c*) *Brooks* v. *Hassall*, 49 L. T. 569.

(*d*) *Pearse* v. *Boulter*, 2 F. & F. 133; 121 R. R. 782.

(*e*) *Ward* v. *Shew*, 9 Bing. 608; 2 L. J. C. P. 58; 35 R. R. 640.

(*f*) *Acey* v. *Fernie*, 7 M. & W. 151; 10 L. J. Ex. 9; 56 R. R. 671; *Linford* v. *Provincial, etc., Ins. Co.*, 34 Beav. 291; 11 L. T. 330; 145 R. R. 516.

(*g*) *Cox* v. *Midland Railway*, *supra*.

(*h*) *Butwick* v. *Grant*, [1924] 2 K. B. 483; 93 L. J. K. B. 972; 131 L. T. 476.

(*i*) *Ante*, p. 212; see also *Sykes* v. *Giles*, 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870.

(*k*) *Underwood* v. *Bank of Liverpool*, [1924] 1 K. B. 775; 93 L. J. K. B. 690; 131 L. T. 271; 40 T. L. R. 372.

has implied authority to do whatever is incidental to the ordinary conduct of such trade or business. Thus the manager of a beer-house has implied authority to buy whatever would usually be dealt in at such a house (*l*), and the manager of a business to which the drawing and accepting of bills of exchange is incidental has implied authority to draw and accept them in the name in which the business is carried on (*m*). So also the managing owner of a ship has implied authority to pledge the credit of his co-owners for repairs and all such other things as are necessary for the usual employment of the ship (*n*), and the general manager of a railway company has implied authority to pledge the company's credit for medical attendance for a servant of the company (*o*). So also the manager of an estate has implied authority to grant usual and customary leases, and to give and receive notices to quit, and to make agreements with tenants with regard to the management of the estate (*p*). So also the servant of a horse dealer has implied authority to warrant a horse which he is instructed to sell, it being " usual in the conduct of the business of a horse dealer " to give a warranty (*q*).

Upon the same principle a general agent employed in the ordinary course of his business as such has implied authority to act according to the general practice and usage of the particular business which he carries on or the particular market in which it is carried on, unless such practice or usage is illegal, or is

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(*l*) *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346; 67 L. T. 831; 9 T. L. R. 133. In this case the defendants, who were owners of a beer-house, appointed A as their manager. The licence was in A's name, which was also over the door. A was forbidden to buy certain goods, which were to be supplied by the defendants themselves. In breach of his instructions A bought such goods from the plaintiff for use in the beer-house and credit was given to him personally by the plaintiff, who knew nothing of the defendants. Subsequently the plaintiff discovered that the defendants were A's principals, and sued them for the price of the goods. *Held*, that, although the defendants had not held out A as their agent (see *post*, p. 232), they were liable for the price of the goods, since their purchase was within the authority usually conferred upon an agent of A's character

(*m*) *Edmunds* v. *Bushell*, L. R. 1 Q. B. 97; 35 L. J. Q. B. 20; 148 R. R. 603.

(*n*) *The Huntsman*, [1894] P. 214; 70 L. T. 386.

(*o*) *Walker* v. *Great Western Railway*, L. R. 2 Ex. 228; 36 L. J. Ex. 123; 16 L. T. 327.

(*p*) *Jones* v. *Phipps*, L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; 18 L. T. 813; *Re Pearson*, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878; 81 L. T. 289.

(*q*) *Howard* v. *Sheward*, L. R. 2 C. P. 148; 36 L. J. C. P. 42; 15 L. T. 183.

unreasonable, and was unknown to his principal when employing him. Thus, if an agent is authorised to sell goods, and it is customary in the trade to warrant that particular class of goods or to sell them on credit, he has implied authority to warrant them (*r*) or to sell them on credit. So also a broker who is employed upon a particular market or exchange has implied authority to act in accordance with all reasonable usages of such market or exchange (*s*). But the mere employment of an estate agent confers on him no authority to make a contract; he is employed merely to find persons to negotiate with the owner. But if he is instructed to sell at a certain price, he has authority to make a binding contract and sign an agreement. His authority is, however, limited to signing an open contract, not a contract with any special conditions (*t*).

Where an agent, whether particular or general, is clothed with ostensible authority, no private instructions given by his principal, but unknown to the persons with whom he deals, can prevent acts within the scope of his ostensible authority from binding his principal (*u*). Thus, where A, having a dispute with B, wrote to B as follows:—"I have seen E and . . . authorised him to come to some amicable arrangement in the matter," and E settled the dispute by agreeing that B should pay £50, it was held that A was bound by this agreement, although he had given private instructions to E not to settle for less than £100 (*x*). But if a person deals with an agent whose authority is to his knowledge limited, he must either ascertain its extent or he deals with the agent at his own risk, for if the authority is exceeded the principal is not liable (*y*).

(*r*) *Dingle* v. *Hare*, 7 C. B. (N.S.) 145; 29 L. J. C. P. 143; 1 L. T. 38; 121 R. R. 424.

(*s*) *Ante*, p. 212.

(*t*) *Keen* v. *Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513; 124 L. T. 19.

(*u*) *Beaufort (Duke of)* v. *Neeld*, 12 Cl. & Fin., at p. 274; *National Bolivian Navigation Co.* v. *Wilson*, 5 A. C., at p. 209; 43 L. T. 70. See also *Smith* v. *McGuire*, 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853.

(*x*) *Trickett* v. *Tomlinson*, 13 C. B. (N.S.) 663; 7 L. T. 678; 134 R. R. 688. Compare *Howard* v. *Sheward* (*ubi supra*), where a horse dealer was held responsible for a warranty given by his servant contrary to express orders. See also *Rainbow* v. *Howkins* (*post*, p. 244).

(*y*) *Chapleo* v. *Brunswick, etc., Society*, 6 Q. B. D., at p. 606; 50 L. J. Q. B. 372; *Russo-Chinese Bank* v. *Li Yau Sam*, [1910] A. C. 174; 79 L. J. P. C. 60; 101 L. T 689; 26 T. L. R. 203. Accordingly a person dealing with an agent whom he knows to be acting under a power of attorney has notice of

Lastly, it must particularly be noticed that, if a transaction effected by an agent is within his actual or ostensible authority, the principal is bound, even though the agent acted fraudulently in furtherance of his own interests (*z*).

Agency of necessity.—In some exceptional cases the implied authority of an agent may be increased, or the relationship of principal and agent may be created, by circumstances of necessity. The chief instance of an agent of necessity is a shipmaster. While other agents have no implied authority to borrow money on behalf of their principals (*a*), a shipmaster may, if he cannot communicate with his owners, borrow money upon their credit for necessaries for the ship. A shipmaster may also, in cases of necessity, when communication with his principals is impossible, exercise many other extraordinary powers. Thus he may, in such circumstances, sell or pledge the ship or cargo, or sell perishable goods which cannot be carried to their destination in a marketable condition, or incur expenditure for the safety of goods and charge their owner with such expenses (*b*). The Courts are not inclined to extend this principle of agency of necessity (*c*); but it has been held that a similar right to sell perishable goods belongs to carriers by land (*d*), and to a vendor who, owing to war conditions, cannot deliver such goods to a purchaser abroad (*e*), and that the right to incur expenditure for the safety of goods belongs to carriers by land (*f*).

A well-established instance of agency of necessity occurs, however, where a wife is deserted by her husband, or through his conduct is compelled to leave him, in which cases, if he

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the terms of the power (*Jacobs* v. *Morris*, [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 18 T. L. R. 384).

(*z*) *Hambro* v. *Burnand & Co.*, [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547.

(*a*) *Hawtayne* v. *Bourne*, 7 M. & W. 595; 10 L. J. Ex. 224; 56 R. R. 806.

(*b*) For the powers of a shipmaster, see *post*, Part II., Chapter III., s. 3.

(*c*) See *e.g.*, *Hawtayne* v. *Bourne* (*ubi supra*); *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579.

(*d*) *Sims* v. *Midland Railway*, [1913] 1 K. B. 103; 82 L. J. K. B. 67; 107 L. T. 700; 29 T. L. R. 81; *Springer* v. *Great Western Railway*, [1921] 1 K. B. 257; 89 L. J. K. B. 1010; 124 L. T. 79.

(*e*) *Prager* v. *Blatspiel*, [1924] 1 K. B. 566; 93 L. J. K. B. 410.

(*f*) *Great Northern Railway* v. *Swaffield*, L. R. 9 Ex. 132; 43 L. J. Ex. 89; 30 L. T. 562.

makes no provision for her, she has implied authority to bind him by her contracts for necessities (*g*).

Ratification.—The doctrine of ratification as expressed in the maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*, is that where A does any act or enters into any transaction professedly on behalf of B, but either has no authority from B or exceeds the authority given to him by B, the subsequent ratification by B of such act or transaction is equivalent to an antecedent authorisation. The principle applies both to contracts and to torts (*i*), but not to any act or transaction which is void or illegal, or to a contract which could not at the time of the ratification be made by the person purporting to ratify it (*k*). Ratification of a contract is, however, possible only when A contracts as agent and on behalf of a principal who is in existence and in contemplation at the time of the contract (*l*). Thus, if the promoters of a company make a contract on its behalf before its incorporation, the company cannot upon incorporation ratify that contract (*m*), but must make a new contract on the same terms (*n*). Nor, when a contract is made by A, professedly as principal and without having at the time any principal, but having an undisclosed intention or hope of inducing B to adopt it, can it be subsequently ratified by B (*o*). But it is not neces-

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(*g*) *Post*, p. 246.

(*i*) *Bird* v. *Brown*, 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775.

(*k*) *Banque Jacques-Cartier* v. *Banque d'Epargne*, 13 A. C., at p. 118; 57 L. J. P. C. 42. Thus a forged signature cannot be ratified (*Brook* v. *Hook*, L. R. 6 Ex. 89; 40 L. J. Ex. 50; 24 L. T. 34); nor can a company ratify a contract which is beyond the powers conferred by its memorandum of association (*Ashbury Carriage Co.* v. *Riche*, L. R. 7 H. L. 653; 44 L. J. Ex. 183; 33 L. T. 450); but a company may ratify a contract made by its directors in excess of their powers provided that it is not *ultra vires* the company (*Grant* v. *United Switchback, etc., Co.*, 40 Ch. D. 135; 58 L. J. Ch. 211; 5 T. L. R. 92).

A contract of marine insurance (*Williams* v. *North China Association*, 1 C. P. D. 757; 35 L. T. 884), but not of fire insurance (*Grover* v. *Mathews*, [1910] 2 K. B. 401; 79 L. J. K. B. 1025; 102 L. T. 650; 26 T. L. R. 411), may, however, be ratified after the loss of the property insured and although the person ratifying it has knowledge of the loss.

(*l*) *Keighley, Maxted & Co.* v. *Durant*, [1901] A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527.

(*m*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; *Re Empress Engineering Co.*, 16 Ch. D. 125; 43 L. T. 742; *Re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16; 54 L. T. 219.

(*n*) *Howard* v. *Patent Ivory Co.*, 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395.

(*o*) *Keighley, Maxted & Co.* v. *Durant* (*ubi supra*).

sary that the identity of principal should be known to the agent when he contracts. Thus, a contract of marine insurance may be made generally on behalf of everyone interested in the subject-matter of the policy, and anyone on whose behalf the policy is effected may ratify the insurance to the extent of his interest, unless it is established that he was not in fact such a person as those who effected the policy had in contemplation (*p*). So also, a person may act on behalf of the owner of particular property, though unascertained and unknown to him, and the owner, when ascertained, may ratify the transaction (*q*).

The ratification of a contract must take place within a reasonable time after its formation and before the time for commencement of its performance by the other party (*r*). And, where it is essential to the validity of an act that it should be done at or before a particular time it cannot be ratified after that time so as to affect third parties. Thus, notice of intention to exercise an option cannot be ratified after the option has expired (*s*), and notice to quit cannot be ratified after the expiration of the time for giving notice (*t*). Ratification cannot, moreover, divest an estate which has once vested, nor render unlawful an act which was lawful at the time of its performance (*u*).

Subject to the foregoing limitations a ratification relates back to the date of the act or transaction which is ratified and produces the same consequences as if at that date it had been authorised by the person ratifying it (*x*). Thus, where an offer made by A has been accepted by B on behalf of C, the acceptance may be ratified by C, although he has notice that A has withdrawn his offer (*y*).

(*p*) *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1906] A. C. 336; 75 L. J. K. B. 357; 94 L. T. 806; 22 T. L. R. 571.

(*q*) *Foster* v. *Bates*, 12 M. & W. 226; 13 L. J. Ex. 88; 67 R. R. 81; *Lyell* v. *Kennedy*, 14 A. C. 437; 59 L. J. Q. B. 268; 62 L. T. 77.

(*r*) *Metropolitan Asylums Board* v. *Kingham*, 6 T. L. R. 217.

(*s*) *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137.

(*t*) *Doe* d. *Lyster* v. *Goodwin*, 2 Q. B. 143; 10 L. J. Q. B. 275.

(*u*) *Bird* v. *Brown*, 4 Ex., at p. 798; 19 L. J. Ex. 154; 80 R. R. 775.

(*x*) *Wilson* v. *Tumman*, 6 Man. & G. 236; 12 L. J. C. P. 306; 64 R. R. 770; *Koenigsblatt* v. *Sweet*, [1923] 2 Ch., at p. 325; 92 L. J. Ch. 598; 129 L. T. 659; 39 T. L. R. 576.

(*y*) *Bolton Partners* v. *Lambert*, 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 5 T. L. R. 357; *Re Portuguese Copper Mines, Ltd.*, 45 Ch. D. 16; 62 L. T. 179; *Re Tiedemann*, [1899] 2 Q. B. 66; 68 L. J. Q. B. 252;

Ratification of a deed can be effected only by deed (*z*), but in other cases a ratification may be in any form and may be express or inferred. Thus a written contract may be ratified orally, even if it be a contract which is not enforceable unless evidenced by writing (*a*). A ratification of an act or transaction will be inferred whenever the conduct of the person on whose behalf it was done or effected is such as to indicate an intention by him to adopt or recognise it in whole or in part, and a ratification of part of a transaction operates as ratification of the whole (*b*): a person cannot, therefore, accept the benefits of a transaction unless he also adopts the burdens thereof (*c*); thus the receipt of purchase-money generally operates as a ratification of an unauthorised sale (*d*). In the case of an agent acting in excess of his authority a ratification may be inferred from the mere silence or passive acquiescence of his principal (*e*).

No one can, however, be deemed to have ratified any act or transaction done or entered into without his authority, unless at the time of the ratification he had full knowledge of what that act or transaction was, or his adoption of it was so unqualified that the inference may properly be drawn that he intended to take upon himself the responsibility of such act or transaction whatever it might be (*f*); but it is not necessary that he should be aware of the legal effect of the act or transaction (*g*).

Estoppel. Holding out.—Lastly, a person may, as a result of

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81 L. T. 191. These cases have, however, been doubted (see *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1).

(*z*) *Hunter* v. *Parker*, 7 M. & W. 322; 10 L. J. Ex. 281; 9 L. T. 53; 56 R. R. 723; *Oxford Corporation* v. *Crow*, [1893] 3 Ch. 535; 69 L. T. 228.

(*a*) *Maclean* v. *Dunn*, 4 Bing. 722; 6 L. J. C. P. 184; 29 R. R. 714; *Somes* v. *Spencer*, 1 Dow. & Ry. K. B. 32.

(*b*) *Hovil* v. *Pack*, 7 East, 164; *Keay* v. *Fenwick*, 1 C. P. D., at p. 753.

(*c*) *Hovil* v. *Pack* (*ubi supra*); *Bristow* v. *Whitmore*, 9 H. L. C. 391; 31 L. J. Ch. 467; 4 L. T. 622; 131 R. R. 242.

(*d*) *Hunter* v. *Parker* (*ubi supra*); *Keay* v. *Fenwick* (*ubi supra*); but see *The Bonita*, 30 L. J. P. M. & A. 145; 5 L. T. 141.

(*e*) *Pott* v. *Bevan*, 1 C. & K. 335; 13 L. J. C. P. 187; *Robinson* v. *Gleadow*, 2 Bing. N. C. 156; 42 R. R. 568. Where under a contract with an agent acting in excess of his authority work has been done upon the property of his principal, a ratification cannot be inferred merely because the principal resumes possession of his property and disposes of it (*Forman* v. *The Liddesdale*, [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331).

(*f*) *Marsh* v. *Joseph*, [1897] 1 Ch., at p. 238; 66 L. J. Ch. 128; 75 L. T. 558; 13 T. L. R. 136; see also *The Bonita* (*ubi supra*).

(*g*) *Powell* v. *Smith*, L. R. 18 Eq. 85; 41 L. J. Ch. 734.

the principle of estoppel, be liable for acts and transactions done without any express or implied authority from him and not ratified by him. Estoppel is a rule of evidence by which a person may be prevented from giving evidence to contradict some particular fact (*h*). And whenever one person, by words or conduct, induces another to believe in the existence of any state of things and to act on such belief, he is estopped from contesting, as against such other person, the existence of that state of things (*i*). Accordingly, whenever A is "held out" by B as his agent, *i.e.*, is either represented by B to be his agent, or is permitted or authorised by B to exercise an authority which may reasonably be assumed to be a real authority, B is estopped as against persons dealing in good faith with A in reliance upon such "holding out," from contesting the existence or extent of the authority which he has represented A to possess or allowed him to exercise (*k*).

The doctrine of "holding out" applies only (i) "where the holding out is something other than the truth" (*l*); (ii) when the person dealing with A knows of the existence of B (*m*); (iii) when the holding out is to the particular individual who says he relied on it, or is under such circumstances of publicity as to justify the inference that he knew of it and acted on it (*n*).

Whether in any particular case one person has been held out as the agent of another is an inference of fact, provided that there are any circumstances that can support such an inference (*o*). Thus if B has on several occasions permitted A to buy from C

(*h*) *Ante*, p. 23.

(*i*) See further *post*, Part IV., Estoppel.

(*k*) *Smith* v. *M'Guire*, 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853. Note that the doctrine of "holding out" applies not only to the existence of agency, but to the extent of an agent's authority. Thus even a special agent may be held out as having authority to do something which is beyond the scope of his implied authority (*id.*: and see *Brady* v. *Todd*, 9 C. B. (N.S.), at p. 604; 30 L. J. C. P. 223; 4 L. T. 212; 127 R. R. 797).

(*l*) *Chapleo* v. *Brunswick Building Society*, 6 Q. B. D., at p. 706; 50 L. J. Q. B. 372; 44 L. T. 449.

(*m*) *Watteau* v. *Fenwick*, [1893] 1 Q. B., at 349; 67 L. T. 831; 9 T. L. R. 133; see *ante*, p. 226.

(*n*) *Farquharson Brothers* v. *King*, [1902] A. C., at p. 341; 71 L. J. Q. B. 667; 86 L. T. 810; 18 T. L. R. 665.

(*o*) *Wright* v. *Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L T 373; 18 T. L. R. 404; see also *Chapleo* v. *Brunswick Building Society* (*ubi supra*); *Spooner* v. *Browning*, [1898] 1 Q. B., at p. 536; 67 L. J. Q. B. 339; 78 L. T. 97; 14 T. L. R. 245.

goods for which he has habitually paid C, and A fraudulently and without authority obtains goods from C on B's credit but for his own use, it is a question of fact whether B has so conducted himself as to make C believe that A was his agent and to deal with A on that footing (*p*). Where, however, the defendant employed A as his coachman under an agreement whereby A was to be paid a weekly sum to include the cost of foraging the defendant's horses, and forage was for several months bought by A from the plaintiff, who, not being told by A of the arrangement, gave credit to the defendant, the latter not knowing from whom the forage was bought and merely paying A the agreed weekly sum, it was held that there was no evidence of a holding out by the defendant of A as having authority to pledge his credit for forage (*q*). And it has also been held that the fact that A is the manager of a *tied* public-house is no evidence that he has been held out as having authority to buy spirits from persons other than those to whom the public-house is tied (*r*).

Where a person has been deceived by an agent into believing that he may safely buy or otherwise deal with goods, he must in general bear any loss which he incurs thereby, unless he can prove that he was misled by the conduct of the true owner. Thus, if A, who has not been held out by his principal to C as having authority to sell goods to C, fraudulently sells to C goods to which he has access, his principal can recover from C the goods or their value (*s*): but if A has been clothed with the apparent ownership and right of disposition and has thus been held out as being the owner of or having authority to dispose of the goods of his principal, the latter must bear the loss occasioned by any fraudulent disposition of the goods by A in the exercise of his apparent authority (*t*).

(*p*) *Gillman* v. *Robinson*, 1 C. & P. 642; 28 R. R. 795; *Summers* v. *Solomon*, 7 E. & B. 878; 26 L. J. Q. B. 301; 110 R. R. 872; *Cornish* v. *Abington*, 4 H. & N. 549; 28 L. J. Ex. 262; 118 R. R. 603.

(*q*) *Wright* v. *Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L. T. 373; 18 T. L. R. 404. It was also held that the mere relationship of master and coachman did not of itself involve as a matter of law ostensible authority to pledge his master's credit for forage.

(*r*) *Daun* v. *Simmins*, 41 L. T. 783; 48 L. J. C. P. 343.

(*s*) *Farquharson* v. *King*, [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 18 T. L. R. 665.

(*t*) *Fry* v. *Smellie*, [1912] 3 K. B. 282; 81 L. J. K. B. 1003; 106 L. T. 404.

In the case of goods entrusted to a *mercantile agent* the Common Law responsibility has been extended by the Factors Acts which will be considered later (*u*).

Notice to agent.—Where knowledge is acquired by an agent, in the course of his employment (*x*), of any facts or circumstances material to the transaction or business in respect of which he is employed, the principal is, as a general rule, deemed to have notice of such facts or circumstances, provided that they are of such a nature that it is the duty of the agent to communicate them to him (*y*). Thus, where an agent of an insurance company negotiated a contract of insurance, it was held that the knowledge of the agent that the assured had lost the sight of one eye was equivalent to notice to the company of that fact (*z*). This general rule does not, however, apply where the agent is a party to the commission of a fraud upon his principal, the success of which requires the concealment of the facts or circumstances in question (*a*).

Relations between Agents and Third Persons.—Here two classes of cases must be distinguished—namely, (A) where the agent is acting with authority; and (B) where he is acting without authority.

(A) *Agent acting with authority.*—Where an agent is acting with authority, the general rule, as already stated, is that all

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(*u*) *Post*, Part II., Chapter IV., s. 1.

(*x*) *Société Generale de Paris* v. *Tramways Union Co.*, 14 Q. B. D. 424; 54 L. J. Q. B. 177; 52 L. T. 912; *Wells* v. *Smith*, [1914] 3 K. B., at p. 725; 83 L. J. K. B. 1614; 111 L. T. 809; 30 T. L. R. 623. Thus, where a man is agent of two companies, knowledge which he obtains as secretary of one company does not operate as notice to the other company unless it was his duty to communicate it to such other company (*Re Fenwick*, [1902] 1 Ch. 507; 71 L. J. Ch. 321; 86 L. T. 193).

(*y*) *Blackburn* v. *Vigors*, 12 A. C. 531; 57 L. J. Q. B. 114; 57 L. T. 730; 3 T. L. R. 837.

(*z*) *Bawden* v. *London, etc., Assurance Co.*, [1892] 2 Q. B. 534; 61 L. J. Q. B. 792; 8 T. L. R. 566; see also *Ayrey* v. *British Legal Association*, [1918] 1 K. B. 136; 87 L. J. K. B. 513; 118 L. T. 255; 34 T. L. R. 111; *Keeling* v. *Pearl Assurance Co.*, 129 L. T. 573. But compare *Biggar* v. *Rock Life Insurance Co.*, [1902] 1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636.

(*a*) *Rolland* v. *Hart*, L. R. 6 Ch. 678; 40 L. J. Ch. 701; 25 L. T. 191; *Cave* v. *Cave*, 15 Ch. D. 339; 49 L. J. Ch. 505; 42 L. T. 730; *Wells* v. *Smith* (*ubi supra*). But the mere fact that the agent has an interest in suppressing knowledge which he ought to communicate to his principal is not sufficient to prevent such knowledge from being imputed to the principal (*Bradley* v. *Riches*, 9 Ch. D. 189; 47 L. J. Ch. 811; 38 L. T. 810).

rights and liabilities under any contract or transaction made or entered into by him will pass to his principal, whether disclosed or undisclosed (*b*). This general rule is, however, subject to the following qualifications:—

Exceptional rules affecting the rights and liabilities of principal and agent against and to third parties.

1. The rights (*c*) or liabilities (*d*) of the principal may be excluded by the express terms of the contract.

2. Only the parties to a deed can sue or be sued upon it (*e*). If, therefore, an agent contracts by deed, to which his principal is not a party, he alone can sue or be sued upon it, even though he expressly describes himself as contracting on behalf of a named principal (*f*).

But by s. 123 of the Law of Property Act, 1925 (*g*), every instrument executed by the donee of a power of attorney in his own name and signature, and under his own seal, is as effectual in law as if it had been executed by the donee of the power in the name and with the signature and under the seal of the donor of the power.

3. When an agent is the payee or indorsee of a bill of exchange, promissory note, or cheque, he alone can sue upon it, though he may indorse it to his principal so as to enable the latter to sue; and no one can be sued upon a bill of exchange, promissory note, or cheque, unless his signature appears thereon (*h*). Accordingly the principal is liable only if his name is signed thereon by himself or by an authorised agent; and,

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(*b*) *Sims* v. *Bond*, 5 B. & Ad. 389; 39 R. R. 511; *Thomson* v. *Davenport*, 9 B. & C. 78; 7 L. J. K. B. 134; 32 R. R. 578; *Calder* v. *Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129. The right to sue and the liability to be sued are correlative—"a man cannot make a contract in such a way as to take the benefit, unless he also takes the responsibility (*Miller, Gibb & Co.* v. *Tyrer*, [1917] 2 K. B., at p. 150; 86 L. J. K. B. 1259; 116 L. T. 753; 33 T. L. R. 295).

(*c*) *Montgomerie* v. *U. K. Mutual S.S. Association*, [1891] 1 Q. B. 370; 60 L. J. Q. B. 429; 64 L. T. 323; 7 T. L. R. 203.

(*d*) *U. K. Mutual S.S. Association* v. *Nevill*, 19 Q. B. D. 110; 56 L. J. Q. B. 222; 3 T. L. R. 658.

(*e*) *Beckham* v. *Drake*, 9 M. & W., at p. 95; 11 L. J. Ex. 201; 60 R. R. 678.

(*f*) *Appleton* v. *Binks*, 5 East, 148; 7 R. R. 672; *Berkeley* v. *Hardy*, 5 B. & C. 355; 4 L. J. K. B. 184; 29 R. R. 261; see also *Torrington* v. *Lowe*, L. R. 4 C. P. 26; 38 L. J. C. P. 121.

(*g*) Replacing s. 46 of the Conveyancing Act, 1881.

(*h*) Bills of Exchange Act, 1882, s. 23.

conversely, it is the agent who is liable if his name is signed thereon, unless he adds words to his signature indicating that he signs for or on behalf of his principal (*i*).

4. In cases other than the foregoing an agent can sue or be sued only if he contracts personally. Whether or not he has contracted personally is a question of fact (*k*) depending upon the intention of the parties to the contract as ascertained by the terms of the contract or the circumstances of the case (*l*).

Where a contract is signed by an agent in his own name, without any qualification of the signature, he is presumed to have intended to contract personally, unless the contract, as a whole, is, on the face of it, clearly inconsistent with his personal liability. Where, on the other hand, an agent adds words to his signature, indicating that he signs as agent for or for or on behalf of a principal, he is not presumed to have intended to contract personally, unless some term of the contract shows that, in spite of the form of the signature, he intended to contract personally (*m*).

Subject to these general rules:—

i. Where an agent contracts for a named principal, he is presumed not to have contracted personally (*n*).

ii. Where an agent contracts without disclosing the name of his principal, he or his principal can, as a rule, sue and be sued upon the contract, unless he therein

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(*i*) *Id.*, ss. 22, 26, 91. Moreover, save in the case of an acceptance for honour, no one can be liable as *acceptor* of a bill except the person to whom it is addressed (*id.*, s. 17). These sections will be more fully considered in Part II., Chapter V.

(*k*) *Green* v. *Kopke*, 18 C. B., at p. 560; 25 L. J. C. P. 297; 107 R. R. 404.

(*l*) *Green* v. *Kopke* (*ubi supra*); *Cooke* v. *Wilson*, 1 C. B. (N.S.) 153; 26 L. J. C. P. 15; 107 R. R. 607; *Calder* v. *Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129; *Gadd* v. *Houghton*, 1 Ex. D. 357; 46 L. J. Q. B. 71; 35 L. T. 222; *Glover* v. *Langford*, 8 T. L. R. 628; *Repetto* v. *Millar's, etc., Ltd.*, [1901] 2 K. B. 306; 70 L. J. K. B. 561; 84 L. T. 836; 17 T. L. R. 421.

(*m*) *Cooke* v. *Wilson* (*ubi supra*); *Gadd* v. *Houghton* (*ubi supra*); *Brandt & Co.* v. *Morris & Co.*, [1917] 2 K. B. 784; 87 L. J. K. B. 101; 117 L. T. 196; *Universal Steam Navigation Co.* v. *McKelvie*, [1923] A. C. 492; 92 L. J. K. B. 647; 129 L. T. 395; 39 T. L. R. 480 (overruling *Lennard* v. *Robinson*, 24 L. J. Q. B. 275; 103 R. R. 402; 5 E. & B. 125); *Kimber Coal Co.* v. *Stone*, [1926] A. C. 414; 95 L. J. K. B. 601; 135 L. T. 161; 42 T. L. R. 430.

(*n*) *Ex p. Hartop*, 12 Ves., at p. 352; *Green* v. *Kopke* (*ubi supra*); *Fairlie* v. *Fenton*, L. R. 5 Ex. 169; 39 L. J. Ex. 107; 22 L. T. 373.

expressly contracts as agent (*o*), though even in such a case he may by a special custom incur liability (*p*), provided that such custom is not inconsistent with the express terms of the contract (*q*).

iii. Where an agent contracts without disclosing the existence of his principal, he thereby contracts as principal, and can sue and be sued upon the contract (*q*). But even in this case the principal can sue and be sued, unless evidence of his existence would contradict the express terms of the contract (*r*). Thus, where an agent executed a charterparty, in which he was described as the "owner" of the ship, it was held that evidence was not admissible to show that he contracted as agent for the real owner (*s*).

When a contract is in writing, and is in such terms as to indicate an intention on the part of the agent to contract personally, he cannot give oral evidence for the purpose of showing that it was the intention of the parties that he should not be personally liable, because such evidence would be inconsistent with the written agreement (*t*); but although a contract is in writing, oral evidence may be given to show that a person not therein mentioned is the real principal, because such evidence does not contradict the written contract, but merely shows whom it binds (*u*); and a person who contracts in writing as agent

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(*o*) See *Southwell* v. *Bowditch*, 1 C. P. D. 374; 45 L. J. C. P. 630; 35 L. T. 196; *Universal Steam Navigation Co.* v. *McKelvie* (*ubi supra*).

(*p*) *Fleet* v. *Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; *Hutchinson* v. *Tatham*, L. R. 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; *Pike* v. *Ongley*, 18 Q. B. D. 708; 56 L. J. Q. B. 373; 3 T. L. R. 549.

(*q*) *Barrow* v. *Dyster*, 13 Q. B. D. 635; 51 L. T. 573; *Benton* v. *Campbell, Parker & Co.*, [1915] 2 K. B., at p. 414; 94 L. J. K. B. 881; 41 T. L. R. 662. But this principle does not apply where an agent is *selling specific* goods which the buyer knows are not the property of the agent (*id.*).

(*r*) *Dunlop Pneumatic Tyre Co.* v. *Selfridge & Co.*, [1915] A. C., at p. 864; 84 L. J. K. B. 1680; 113 L. T. 386; 31 T. L. R. 399.

(*s*) *Humble* v. *Hunter*, 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291; see also *Formby* v. *Formby*, 102 L. T. 106. But where an agent contracted as "charterer," evidence was admitted to show that he contracted as agent so as to permit the undisclosed principal to sue (*Drughorn, Ltd.* v. *Rederiaktiebolaget Transatlantic*, [1919] A. C. 203; 88 L. J. K. B. 233; 120 L. T. 70).

(*t*) *Higgins* v. *Senior*, 8 M. & W. 834; 11 L. J. Ex. 199; 58 R. R. 884.

(*u*) *Id.*; *Calder* v. *Dobell* (*ubi supra*). See also *Young* v. *Schuler*, 11 Q. B. D. 461; 49 L. T. 546.

for an undisclosed principal is not thereby precluded from subsequently declaring himself to be the real principal (*x*).

It was at one time considered that, when an agent contracted for a foreign principal, there was a presumption that he contracted personally. It has, however, recently been stated that, if such a presumption ever existed (*y*), it has no application to modern conditions, and that in the absence of any general or special custom there is no presumption of law or fact that an agent contracting for a foreign principal contracts personally (*z*). And it has further been held that, assuming the modern existence of such a presumption, it cannot apply where it is inconsistent with the terms of a contract expressly stating that the foreign principal is to be liable or establishing privity of contract between the foreign and the English principal (*a*).

Discharge of principal by election of third party to charge agent.—When an agent fails to disclose the name or the existence of his principal, the other party to the contract has not the right to sue both the principal and the agent, but must elect which he will hold liable; and if he finally elects to make either liable, he loses his remedies against the other (*b*). The following rules on this point are laid down in the case of *Thomson* v. *Davenport* (*c*) and subsequent decisions:—

If a seller knows that the buyer, who is nominally dealing

(*x*) *Schmalz* v. *Avery*, 16 Q. B. 355; 20 L. J. Q. B. 228; 83 R. R. 653; *Harper & Co.* v. *Vigers Bros.*, [1909] 2 K. B. 549; 78 L. J. K. B. 876; 100 L. T. 887; 25 T. L. R. 627.

(*y*) As to which see *Green* v. *Kopke* (*ubi supra*).

(*z*) *Miller, Gibb & Co.* v. *Smith & Tyrer, Ltd.*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259; 116 L. T. 753; 33 T. L. R. 295; *Brandt* v. *Morris*, [1917] 2 K. B., at pp. 793, 797; 87 L. J. K. B. 101; 117 L. T. 196; *Mercer* v. *Wright, Graham & Co.*, 33 T. L. R. 444; *Universal Steam Navigation Co.* v. *McKelvie*, [1923] A. C., at p. 496; 92 L. J. K. B. 647; 129 L. T. 395; 39 T. L. R. 480.

(*a*) *Miller, Gibb & Co.* v. *Smith & Tyrer, Ltd.* (*ubi supra*); *Mercer* v. *Wright* (*ubi supra*). Where, however, in an oral contract the facts are doubtful, or where the terms of a contract are ambiguous, the facts that the principal is a foreigner and that his name is not disclosed are circumstances to be considered in determining what inferences of fact are to be drawn as to the intention of the parties (*Mercer* v. *Wright*, (*ubi supra*); *Brandt* v. *Morris* (*ubi supra*); *Miller, Gibb & Co.* v. *Smith & Tyrer, Ltd.*, [1917] 2 K. B., at pp. 162, 163).

(*b*) *Repetto* v. *Millar's, Ltd.*, [1901] 2 K. B., at p. 310; 70 L. J. K. B. 561; 84 L. T. 836; 17 T. L. R. 421.

(*c*) 9 B. & C., at p. 86; 7 L. J. K. B. 134; 32 R. R. 578.

with him, is not a principal, but an agent, *and also knows who the real principal is*, but chooses to make the agent his debtor, dealing with him and him alone, he cannot afterwards make the principal liable.

If the seller supposes himself to be dealing with a principal, whereas in fact he is dealing with an agent, he may sue the principal upon discovering him, unless either (i) the principal has in good faith paid the agent while credit was still given exclusively to the agent (*d*), or (ii) the seller has, after discovery of the principal, unequivocally elected to make only the agent liable (*e*), of which election the recovery of judgment against the agent is conclusive proof (*f*).

If the seller knows that he is dealing with an agent, but does not know the name of the principal, his position is the same as if the existence of the principal had been undisclosed, except that the principal is not discharged by payment to the agent, unless he was misled by some conduct of the seller into the belief that the agent had already settled with the seller and made such payment in consequence of such belief (*g*).

Discharge of third party by settlement with agent.—A person dealing with an agent who contracts personally may in some circumstances be discharged from liability towards the principal by payment to or settlement with the agent, and may have, as against the principal, a right of set-off in respect of debts due from the agent, as if they had been due from the principal. Thus S, a factor, being entrusted by B with the possession of goods for sale, sold them in his own name, the buyers believing him to be the owner. Subsequently, but before the buyers knew that S was only an agent, he became indebted to them. In an action brought by B for the price of the goods, it was held

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(*d*) *Armstrong* v. *Stokes*, L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; 26 L. T. 872, as explained in *Irvine* v. *Watson* (*infra*).

(*e*) *Calder* v. *Dobell*, L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 29.

(*f*) *Priestley* v. *Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172; 13 L. T. 208. If judgment is recovered against the agent the principal cannot afterwards be sued, even though the judgment does not result in satisfaction of the debt (*Kendall* v. *Hamilton*, 4 A. C., at p. 514; 48 L. J. C. P. 705; 41 L. T. 418; see also *Morel Bros.* v. *Westmorland* (*Earl*), [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 712; 20 T. L. R. 38; *Moore* v. *Flanagan*, [1920] 1 K. B. 919; 89 L. J. K. B. 417; 122 L. T. 739).

(*g*) *Irvine* v. *Watson*, 5 Q. B. D. 414; 49 L. J. Q. B. 531; 42 L. T. 800; *Davison* v. *Donaldson*, 9 Q. B. D. 623; 47 L. T. 564.

that the buyers might set off the amount due to them from S (*h*). The principle rests upon the doctrine of estoppel: accordingly, in order to give a buyer of goods these rights, it is not sufficient to show merely that the agent sold in his own name, the buyer not knowing whether he was acting as agent or as principal; it must be shown that the agent was permitted by the real principal to hold himself out as the principal, and that the buyer, in dealing with the agent as principal, acted upon a belief induced by the conduct of the real principal (*i*). The principle is not confined to the sale of goods (*k*), and has been applied to a case in which the agent was employed to collect money, the general rule being thus stated:—"If A employs B as his agent to make a contract for him, or to receive money for him, and B makes a contract with C, or employs C as his agent, if B is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C to be acting as an agent for anyone, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal" (*l*).

(B) *Agent acting without authority*.—If an agent contracts for a fictitious or non-existing principal, or a person without contractual capacity, he himself is personally liable upon the contract (*m*). If he innocently misrepresents his authority, he may be sued *ex contractu* for damages for the breach of an *implied warranty of authority*: this liability arises from the fact that by professing to act as agent he impliedly contracts that he has authority, and it is immaterial whether he knew of the defect of his authority or not, and whether he never had authority, or his original authority has ceased by reason of facts of which he has not knowledge or means of knowledge, as, *e.g.*,

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(*h*) *Borries* v. *Imperial Ottoman Bank*, L. R. 9 C. P. 38; 43 L. J. C. P. 3; 29 L. T. 689.

(*i*) *Cook* v. *Eshelby*, 12 A. C. 271; 56 L. J. Q. B. 505; 56 L. T. 673, explaining *George* v. *Clagett*, 7 T. R. 359; 4 R. R. 462, and earlier authorities.

(*k*) *Montagu* v. *Forwood*, [1893] 2 Q. B. 350; 69 L. T. 371; 9 T. L. R. 634.

(*l*) [1893] 2 Q. B., at p. 355.

(*m*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Simmons* v. *Liberal Opinion, Ltd.*, [1911] 1 K. B. 966; 80 L. J. K. B. 617; 104 L. T. 264; 27 T. L. R. 278.

where his authority had determined through the death or lunacy of his principal (*n*). This implied contract may, however, be excluded by the facts of the particular case (*o*). Lastly, if he fraudulently misrepresents his authority he may be sued *ex delicto* in an action for deceit (*p*).

Determination of Agency.—The contract of agency may be discharged in the same ways as any other contract. In particular, the authority of an agent may be determined:—

1. By the happening of any event on the occurrence of which it has been expressly or impliedly agreed that the agency shall cease, *e.g.*, by the completion of the transaction or expiration of the time for which it was given (*q*), or by the happening of any event which renders its continuance unlawful (*r*).

2. By the death (*s*), lunacy or unsoundness of mind (*t*), or bankruptcy (*u*) of the principal.

3. By revocation by the principal or renunciation by the agent. The authority of an agent cannot, however, be revoked—

i. Where it is an "authority coupled with an interest," *i.e.*, where it was given by deed or for valuable consideration for the purpose of giving some benefit to the donee, as, *e.g.*, where the principal gives the agent

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(*n*) *Collen* v. *Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215; 110 R. R. 611; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57. See also *Starkey* v. *Bank of England*, [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; *Sheffield Corporation* v. *Barclay*, [1905] A. C. 114; 74 L. J. K. B. 747; 93 L. T. 83; *Benton* v. *Campbell, Parker & Co.*, [1925] 2 K. B., at p. 415; 94 L. J. K. B. 881; 41 T. L. R. 662; *Edwards* v. *Porter*, [1925] A. C., at pp. 21—23; 94 L. J. K. B. 65; 132 L. T. 496; 41 T. L. R. 57.

(*o*) [1910] 1 K. B., at p. 227.

(*p*) *Polhill* v. *Walter*, 3 B. & Ad. 114; 1 L. J. K. B. 92; 37 R. R. 344.

(*q*) *Seton* v. *Slade*, 7 Ves., at p. 276; 6 R. R. 124; *Blackburn* v. *Scholes*, 2 Camp. 343; 11 R. R. 723; *Bell* v. *Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 15 T. L. R. 621.

(*r*) *Marshall* v. *Glanville*, [1917] 2 K. B. 87; 86 L. J. K. B. 767; 116 L. T. 560; 33 T. L. R. 301.

(*s*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 210.

(*t*) *Drew* v. *Nunn*, 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; *Yonge* v. *Toynbee* (*ubi supra*).

(*u*) *I.e.*, by the fact that a receiving order has been made or by notice of an available act of bankruptcy. See *Ex p. Snowball*, L. R. 7 Ch. 534; 41 L. J. Bk. 49; 26 L. T. 894; *Markwick* v. *Hardingham*, 15 Ch. D. 339; 43 L. T. 647; *Re Pollitt*, [1893] 1 Q. B. 455; 62 L. J. Q. B. 236; 68 L. T. 366.

authority to sell goods for the purpose of repaying a debt due to him from the principal (*x*).

ii. Where liability has been incurred by the agent in pursuance of the authority given to him (*y*).

iii. Where a power of attorney, created after December 31, 1882, and given for valuable consideration, is expressed to be irrevocable, or, whether given for valuable consideration or not, is expressed to be irrevocable for a fixed time therein stated; in which cases it cannot be revoked as against a purchaser (*z*).

As to revocation and renunciation, it must be noticed that they may occur either under express or implied agreement between the principal and agent, or in breach of the agreement; and, in the latter case, though the authority of the agent is determined, the party guilty of the breach of contract may be liable in damages (*a*). Where there is a contract to employ an agent for a fixed period, the question whether the principal is bound to carry on his business for that period, or whether he may terminate his business and so terminate the contract of agency, depends, in each case, upon the terms of the contract. But the Court will not imply a term that the contract is to remain

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(*x*) *Gaussen* v. *Morton*, 10 B. & C. 731; 8 L. J. (o.s.) K. B. 313; 34 R. R. 558; *Smart* v. *Sandars*, 5 C. B., at p. 917; 75 R. R. 849; *Carmichael's Case*, [1896] 2 Ch. 643; 65 L. J. Ch. 902; 76 L. T. 300. But the authority is not rendered irrevocable because an interest subsequently arises, *e.g.*, where the agent has made advances to his principal *after* the authority has been given to him (*Smart* v. *Sandars*, 5 C. B., at p. 918).

(*y*) *Read* v. *Anderson*, 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55. The principle of this case remains good though its application to the particular facts has been removed by the Gaming Act, 1892 (*ante*, p. 124).

(*z*) Ss. 126 and 127 of the Law of Property Act, 1925, re-enacting ss. 8 and 9 of the Conveyancing Act, 1882.

(*a*) See *Simpson* v. *Lamb*, 17 C. B. 603; 25 L. J. C. P. 113; 104 R. R. 806; see also *ante*, p. 222. As to the measure of damages when an agency is wrongfully revoked, see also *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488; 78 L. J. K. B. 422 (*post*, p. 272). Where an agent is employed otherwise than for a fixed period the contract may be determined by reasonable notice (*post*, p. 270). Where, however, there is no contract to *employ* the agent, but merely a contract, for no definite time, to pay him commission on orders obtained by him, the principal may at any time revoke his authority without notice (*Levy* v. *Goldhill*, [1917] 2 Ch. 297; 86 L. J. Ch. 693; 117 L. T. 422; 33 T. L. R. 479). It may be noticed that where the owner of a house puts it into the hands of an agent for sale, he may nevertheless sell it himself or through another agent, and if the first agent finds a purchaser who cannot purchase because of such sale, he is not entitled to commission (*Brinson* v. *Davies*, 105 L. T. 134).

in force only so long as the principal carries on his business, unless this is a "necessary implication" from the express terms (*b*).

As to revocation, it must be further noticed that when a person has been held out as agent no determination or revocation of his authority is operative as against persons to whom he has been so held out, unless it has been actually communicated to them (*c*).

Special Classes of Agents.

Mercantile Agents.—The chief mercantile agents are factors, brokers, and auctioneers (*d*).

A *factor* is an agent to whom goods are consigned for sale in the ordinary course of his business. He has possession of the goods, implied authority to sell in his own name, and (subject to express instructions) at such times and prices as in his discretion he may think best, implied authority to receive payment, and a *general* lien on the goods and their proceeds (*e*).

A *broker* is a mere negotiator employed to make contracts between his principal and third parties. For this purpose he enters in his broker's book a memorandum of the contract, and sends to the buyer a *bought note* and to the seller a *sold note*. He is not entrusted with the custody or possession of the goods,

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(*b*) *Reigate* v. *Union Manufacturing Co.*, [1918] 1 K. B., at p. 605; 87 L. J. K. B. 724; 118 L. T. 479; *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 64 L. T. 301; 7 T. L. R. 233; *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109 (and see judgment of C. A., [1904] 2 K. B. 410); 74 L. J. K. B. 433; 92 L. T. 478; 21 T. L. R. 359. Where, on the other hand, there is no contract to *employ* an agent for a fixed period, but merely that he shall be sole agent for that period, the Court will not, unless such an implication necessarily arises, imply a term that the employer shall continue his business for that period (*Rhodes* v. *Forwood*, 1 A. C. 256; 47 L. J. Ex. 396; 34 L. T. 890; *Hamlyn* v. *Wood*, 65 L. T. 286; 60 L. J. Q. B. 734; both explained in *Ogden* v. *Nelson*, [1904] 2 K. B. 395; see also *Lazarus* v. *Cairn S.S. Line, Ltd.*, 106 L. T. 378; *Re Newman, Ltd.*, [1916] 2 Ch. 309; 85 L. J. Ch. 625; 115 L. T. 134).

(*c*) *Summers* v. *Solomon*, 26 L. J. Q. B. 301; 7 E. & B. 879; *Drew* v. *Nunn*, 4 Q. B. D. 461; 48 L. J. Q. B. 591; 40 L. T. 671 (insanity of principal); *Debenham* v. *Mellon*, 6 A. C. 24; 50 L. J. Q. B. 155; 43 L. T. 673; *Willis, Faber & Co.* v. *Joyce*, 104 L. T. 576.

(*d*) For the special definition and powers of mercantile agents under the Factors Acts, see *post*, Part II., Chapter IV.

(*e*) See *Baring* v. *Corrie*, 2 B. & Ald. 137; 20 R. R. 383; *Smart* v. *Sandars*, 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 819; *Stevens* v. *Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36.

and therefore has no lien. He has no implied authority to buy or sell in his name or receive payment (*f*).

An *auctioneer* is an agent for the purposes of sale by public auction. He has possession of the goods and a lien for his charges, and if they are unpaid may sue in his own name for the price (*g*). He has no implied authority to warrant goods sold by him (*i*). He has implied authority to sign a memorandum of the contract of sale, not only for the vendor but also for the purchaser, but, in order to bind the purchaser, the memorandum must be made at the time of the sale and by the auctioneer himself, his clerk having no implied authority to sign for the purchaser (*k*). He has implied authority to sell without reserve, and, if he does so, the vendor cannot set up as against the buyer a limitation of that authority not known to the buyer (*l*).

A *del credere* agent is an agent who, for an extra commission, termed a *del credere* commission, undertakes to be liable for the price of goods sold by him in case of non-payment by the purchasers (*m*). But this liability arises only when there is an ascertained debt due from the buyer to the seller and the buyer refuses to pay either through insolvency or something which makes it as impossible to recover as in the case of insolvency: it does not extend to other obligations of the contract so as to make him liable for non-performance or expose him to an action by the seller to ascertain the amount due (*n*). The undertaking of a *del credere* agent is not within the Statute of Frauds (*o*).

(*f*) *Fairlie* v. *Fenton*, L. R. 5 Ex., at p. 172; 39 L. J. Ex. 107; 22 L. T. 373. In accordance with the rules already given (*ante*, p. 236) a broker *may* contract so as to render himself personally liable.

(*g*) *Williams* v. *Millington*, 1 H. Bl. 81; 2 R. R. 724; *Robinson* v. *Rutter*, 4 E. & B. 954; 24 L. J. Q. B. 250; *Grice* v. *Kenrick*, L. R. 5 Q. B. 340; 39 L. J. Q. B. 175; 22 L. T. 743. He may also contract personally with the purchaser (*Woolfe* v. *Horne*, 2 Q. B. D. 355; 46 L. J. Q. B. 534; 36 L. T. 705).

(*i*) *Payne* v. *Leconfield* (*Lord*), 51 L. J. Q. B. 642.

(*k*) *Bell* v. *Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; 70 L. T. 254; 13 T. L. R. 274. But the purchaser may give the auctioneer's clerk express authority to sign as his agent (*ibid*).

(*l*) *Rainbow* v. *Howkins*, [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 20 T. L. R. 508.

(*m*) *Hornby* v. *Lacy*, 6 M. & S., at p. 171; *Ex p. Bright*, *re Smith*, 10 Ch. D., at p. 570; 48 L. J. Bk. 81; 39 L. T. 649; *Weiss*, *etc.*, *Ltd.* v. *Farmer*, [1923] 1 K. B., at p. 240; 92 L. J. K. B. 179; 128 L. T. 471; 39 T. L. R. 118.

(*n*) *Gabriel & Sons* v. *Churchill and Sim*, [1914] 3 K. B. 1272; 83 L. J. K. B. 491; 30 T. L. R. 658.

(*o*) *Post*, Part II., Chapter II., s. 1.

Married Women.—From the time of *Manby* v. *Scott* (*p*) it has been settled that a husband is not liable upon the contracts of his wife unless they were made by her as his agent and with his authority. No authority arises from the fact of marriage only (*q*), and authority must be proved in each case, although it may, on proof of certain circumstances, be *inferred* as a matter of fact, or *implied* by law (*r*).

1. *Where a husband and wife are living together*, and the wife, as manager of his household, buys "goods of such a character and nature as are usually required in those departments of domestic life and economy which the wife ordinarily manages and controls," a jury is justified in drawing the inference of fact that the wife had authority to act as the agent of her husband (*s*).

But this inference may be rebutted by proof—

(a) That the goods were supplied on the credit of the wife to the exclusion of the credit of the husband (*t*):

(b) That the wife was already supplied with a sufficiency of such goods or with an allowance adequate for the purchase of a sufficiency of such goods (*u*):

(c) That the purchase of the goods was excessive in point of extent, or, having regard to the smallness of the husband's income, extravagant (*x*):

(d) That the wife had been forbidden by the husband to

(*p*) (1659), 1 Sid. 112.

(*q*) *Debenham* v. *Mellon*, 6 A. C., at p. 31; 50 L. J. Q. B. 155; 43 L. T. 673.

(*r*) *Montague* v. *Benedict*, 3 B. & C., at pp. 635, 637; 3 L. J. K. B. 94; *Jolly* v. *Rees*, 15 C. B. (N.S.), at pp. 639—40; *Phillipson* v. *Hayter*, L. R. 6 C. P., at p. 41; 40 L. J. C. P. 14; 18 L. T. 299.

(*s*) *Paquin, Ltd.* v. *Beauclerk*, [1906] A. C., at p. 167; 75 L. J. K. B. 395; 94 L. T. 350; 22 T. L. R. 395. The same inference may be raised where the person to whom the management is entrusted is not a wife but a mistress or housekeeper (*Debenham* v. *Mellon*, 6 A. C., at p. 36). The inference is not rebutted by the fact that the wife has a separate income (*Seymour* v. *Kingscote*, 38 T. L. R. 586; *Callot* v. *Nash*, 39 T. L. R. 291).

(*t*) *Paquin, Ltd.* v. *Beauclerk* (*ubi supra*, and cases there cited).

(*u*) *Seaton* v. *Benedict*, 5 Bing. 28; *Debenham* v. *Mellon* (*ubi supra*); *Morel Brothers* v. *Westmorland* (*Earl of*), [1903] 1 K. B. 64; [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 712; 20 T. L. R. 38; *Slater* v. *Parker*, 24 T. L. R. 621; *Miss Gray, Ltd.* v. *Earl Cathcart*, 38 T. L. R. 562.

(*x*) *Miss Gray, Ltd.* v. *Earl Cathcart* (*ubi supra*). Even where the wife has a separate income, however large, it cannot be inferred that she has authority to pledge her husband's credit for extravagancies, and it is for the husband alone to decide on the scale of domestic life (*Callot* v. *Nash* (*ubi supra*)).

pledge his credit, even though this fact was unknown to the person supplying the goods (*y*). If, however, "an appearance of authority is once, in fact, created by the husband's acts, or by his assent to the acts of his wife"—as, *e.g.*, by his paying for goods supplied—the husband is liable to any person dealing with the wife on the faith of such "holding out," unless such person had actual notice that she had in fact no authority or that her authority had been revoked (*z*).

2. *Where a husband and wife are living apart*:—

(a) If the husband has deserted the wife or has, by his conduct, compelled her to leave him, and has not in either case properly provided for her, the wife is, by *implication of law*, an *agent of necessity* for her husband, so as to bind him by her contracts for necessaries (*a*), including necessaries for infant children properly in her custody (*b*).

(b) If the wife leaves the husband without his consent, no authority can be inferred or implied (*c*).

(*y*) *Jolly* v. *Rees*, 15 C. B. (N.S.) 628; 43 L. J. C. P. 177; *Debenham* v. *Mellon* (*ubi supra*).

(*z*) *Debenham* v. *Mellon*, 6 A. C., at pp. 33, 36; 50 L. J. Q. B. 155. See also *Jetley* v. *Hill*, 1 Cab. & E. 239. Here a husband and wife were living together, and furniture was supplied and work done for the house on the orders of the wife. The husband, however, took part in making selections of furniture and giving directions as to the work. *Held*, that he was liable though he had forbidden her to pledge his credit, and it had been agreed between them that she should pay. A wife or mistress may, of course, be "held out" as having authority to act as agent in contracts other than for the supply of necessaries.

(*a*) *Montague* v. *Benedict*, 3 B. & C., at p. 635; 3 L. J. K. B. 94; *Eastland* v. *Burchell*, 3 Q. B. D., at p. 436; 47 L. J. Q. B. 500; 38 L. T. 568; *Debenham* v. *Mellon*, 6 A. C., at p. 31. But even in this case a husband is not liable, even for necessaries supplied to his wife, if she subsequently commits adultery (*Govier* v. *Hancock*, 6 T. R. 603; 3 R. R. 271; *Atkyns* v. *Pearce*, 2 C. B. (N.S.) 763; 26 L. J. C. P. 252; 109 R. R. 876). And, even under the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122; s. 133), a husband is not liable for the support of a wife with whom he has ceased to cohabit in consequence of her adultery (*Culley* v. *Charman*, 7 Q. B. D. 89; 50 L. J. M. C. 111).

(*b*) *Bazeley* v. *Forder*, L. R. 3 Q. B. 559; 37 L. J. Q. B. 237; 18 L. T. 756.

(*c*) *Johnston* v. *Sumner*, 3 H. & N., at p. 269; 27 L. J. Ex. 341; 117 R. R. 679; *Eastland* v. *Burchell*, 3 Q. B. D., at p. 435; 47 L. J. Q. B. 500. But if a wife or mistress has been held out to a particular person as having authority, he must have actual notice of its revocation (*Ryan* v. *Sams*, 12 Q. B. 460; 17 L. J. Q. B. 271).

(c) If they separate by mutual consent, no authority is implied in law; but the authority of the wife to bind her husband by contracts for necessaries may be inferred as a matter of fact—

i. If no adequate provision is made by him for her maintenance, and she has no separate means (*d*).

ii. If the husband does not pay an allowance which, upon separation, he has agreed to pay (*e*).

The term "necessaries" must be considered with regard to the husband's "degree, estate, or circumstances," and it is for the jury to decide as to the wife's necessity (*f*), the burden of proof being upon the plaintiff (*g*).

It is in all cases the duty of a tradesman who sells goods to a married woman, if he wishes to make her husband liable, to enquire if she has his authority (*h*), and, if he knows that she is living apart from him, to enquire the cause of the separation (*i*).

A husband and wife *may* be *jointly* liable upon a contract, the wife being liable in respect of her separate estate, but the mere fact that the husband and wife, each having separate incomes, maintain a common establishment, for which goods are ordered by the wife, affords no evidence of such a joint liability, the fact that the order is by the wife being, if anything, evidence that she alone is liable (*k*). If a husband and wife are jointly liable, a plaintiff who has recovered judgment against the husband cannot subsequently maintain an action against the wife (*l*).

(*d*) *Johnston* v. *Sumner* (*ubi supra*); *Emmett* v. *Norton*, 8 C. & P. 506; 56 R. R. 848; *Dixon* v. *Hurrell*, 8 C. & P. 717. But not if she has separate means (*Clifford* v. *Laton*, 3 C. & P. 15) or an adequate allowance (*Reeve* v. *Conyngham*, 2 C. & K. 444). Whether the provision is adequate is a question for the jury (*Atkyns* v. *Pearce* (*ubi supra*); *Hodgkinson* v. *Fletcher*, 4 Camp. 70).

(*e*) *Hunt* v. *De Blaquiere*, 5 Bing., at p. 558; 7 L. J. C. P. 198; 30 R. R. 737; *Beale* v. *Arabin*, 36 L. T. 249. But not if he pays the agreed allowance, even though it is insufficient (*Eastland* v. *Burchell*, *ubi supra*).

(*f*) *Manby* v. *Scott* (*ubi supra*); and see *Hunt* v. *De Blaquiere* (*ubi supra*), and *Morgan* v. *Chetwynd*, 4 F. & F. 451.

(*g*) *Phillipson* v. *Hayter* (*ubi supra*).

(*h*) *Montague* v. *Benedict*, 3 B. & C., at p. 637; 3 L. J. K. B. 94; *Paquin* v. *Beauclerk*, [1906] A. C., at p. 164; 75 L. J. K. B. 395.

(*i*) *Clifford* v. *Laton*, 3 C. & P., at p. 16.

(*k*) *Morel Brothers* v. *Westmorland* [1903] 1 K. B., at p. 74; 73 L. J. K. B. 93; 89 L. T. 712.

(*l*) See *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565; 64 L. T. 659.

Where they are not jointly liable, the liability of the one is inconsistent with the liability of the other, so that if the plaintiff, having sued both husband and wife alternatively, signs judgment against the wife, he cannot afterwards maintain any claim against the husband (*m*). And, since by s. 1 of the *Married Women's Property Act*, 1893 (*n*), a married woman can be personally liable only when she contracts "otherwise than as agent," she cannot be personally liable where in fact she contracts as agent for her husband, whether or not the other party to the contract knew that she was a married woman (*o*). But if a married woman, having power to bind her husband for necessaries, contracts for such necessaries after his death, she is personally liable (*p*).

From the above it will be seen that an advertisement by a husband in a newspaper that he will not be responsible for his wife's debts is devoid of any effect. For, if they are living together, no notice is necessary unless he has held her out as his agent, in which case such an advertisement is insufficient; if, on the other hand, they are living apart, his liability depends, as a matter of law, upon the reason for the separation, and cannot be got rid of by any notice.

A husband was not at Common Law liable for money lent to his wife to buy necessaries, even though he would have been liable upon a contract by her for necessaries (*q*). But in such a case, if the money was actually spent in necessaries, the lender was, in Equity, entitled to recover it from the husband, and the equitable rule now prevails (*r*).

Solicitors.—The relationship of principal and agent between a solicitor and his client is created only by a retainer given by the latter (*s*), *i.e.*, an authority to act for him in some particular

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(*m*) *Morel Brothers* v. *Westmoreland*, at pp. 76, 77; *Moore* v. *Flanagan*, [1920] 1 K. B. 919; 89 L. J. K. B. 417; 122 L. T. 739.

(*n*) *Ante*, p. 147.

(*o*) *Paquin, Ltd.* v. *Beauclerk* (*ubi supra*).

(*p*) *Yonge* v. *Toynbee*, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57.

(*q*) *Knox* v. *Bushell*, 3 C. B. (N.S.) 334; 111 R. R. 676.

(*r*) *Deare* v. *Soutten*, L. R. 9 Eq. 151.

(*s*) See *Re Becket*, [1918] 2 Ch. 72; 87 L. J. Ch. 457; 119 L. T. 108; 34 T. L. R. 389.

business. Unless writing is required by Common Law or under any statute (*t*) a retainer may be verbal, and may also be inferred from the conduct of the parties (*u*). There is, however, "no such thing as a general retainer of a solicitor," so that special authority must be obtained from the client before litigious proceedings of any kind are taken by a solicitor (*x*).

The relationship is determined (i) by the death of either party (*y*); (ii) by the withdrawal of the retainer by the client (*z*); (iii) by the solicitor declining to act any further for the client. But where a solicitor is retained to prosecute or defend a cause, he enters into an entire contract to conduct the action to its termination; and if during the proceedings he refuses to act any further for the client, he cannot recover any costs for what he has done, unless there are circumstances justifying his refusal; as, for example, if the client repudiates his responsibility for costs, or refuses to make necessary advances for expenses (*a*).

A solicitor is the general agent of his client in all matters which may reasonably be expected to arise for decision in an action (*b*), and has, therefore, implied authority to compromise an action, unless he is expressly forbidden to do so (*c*). But where he is merely employed to act for a client with regard to a

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(*t*) As, *e.g.*, in case of retainer by a corporation (*ante*, p. 30), or where it is to last for more than one year (*Eley* v. *Positive Assurance Co.*, 1 Ex. D. 20; 45 L. J. Ex. 451 (*ante*, p. 69)), or where the name of a person is to be used as "next friend" in an action (Order XVI., r. 20).

(*u*) *Blyth* v. *Fladgate*, [1891] 1 Ch., at p. 355; 60 L. J. Ch. 66; 63 L. T. 546.

(*x*) *Re Gray, Gray* v. *Coles*, 65 L. T. 742; and see *Wray* v. *Kemp*, 26 Ch. D. 169; 53 L. J. Ch. 1020; 50 L. T. 552; *Lord* v. *Kellett*, 2 Myl. & K. 1; *Atkinson* v. *Abbott*, 3 Drew, 251; 106 R. R. 329.

(*y*) *Whitehead* v. *Lord*, 7 Ex. 691; 21 L. J. Ex. 239. As to insanity of the client, see *ante*, p. 241.

(*z*) But if there is a breach by the client of a contract to employ the solicitor for a particular business or period, the latter will have his remedy in the ordinary way for the breach of contract (*Re Galland*, 31 Ch. D., at p. 300; 55 L. J. Ch. 478; 53 L. T. 921; and see *Montforts* v. *Marsden*, [1895] 1 Ch. 11; 64 L. J. Ch. 52; 71 L. T. 620).

(*a*) *Underwood, Son and Piper* v. *Lewis*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60; 70 L. T. 833. See also *Hawkes* v. *Cottrell*, 3 H. & N. 243; 27 L. J. Ex. 369; 117 R. R. 672; *Wadsworth* v. *Marshall*, 2 C. & J. 665; 1 L. J. Ex. 250; 37 R. R. 810.

(*b*) *Prestwich* v. *Poley*, 18 C. B. (N.S.), at p. 816; 34 L. J. C. P. 189; 144 R. R. 683.

(*c*) *Prestwich* v. *Poley*, 18 C. B. (N.S.), at p. 816; and see *Re Newen, Carruthers* v. *Newen*, [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; *Welsh* v. *Roe*, 87 L. J. K. B. 520; 118 L. T. 529; 34 T. L. R. 187.

claim by him against a third person, he cannot, in the absence of express authority, compromise the claim before action (*d*).

The relationship between a country solicitor and a London agent is that of client and solicitor, and the London agent therefore has the same authority to make a compromise as the country solicitor, and may bind both the country solicitor and the lay client (*e*).

A solicitor is bound to have and to exercise reasonable skill and care, and, in general, "he is liable for the consequences of ignorance or non-observance of the rules of practice . . . ; for the want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually allotted to his department of the profession," but "he is not liable for error in judgment upon points of new occurrence, or of nice or doubtful construction" (*f*). He is also liable for the default or negligence of agents employed by him (*g*).

A solicitor is in a fiduciary relationship to his client (*h*). Accordingly, though he is not debarred altogether from buying from, selling to, or otherwise dealing with, his client, yet no transaction between him and his client can stand unless he can prove either that the relationship had been severed, so that his influence had ceased to operate, or that his client acted upon competent and independent advice (*i*); and, further, apart from

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(*d*) *Macaulay* v. *Polley*, [1897] 2 Q. B. 122; 66 L. J. Q. B. 665; 76 L. T. 643.

(*e*) *Withers* v. *Parker*, 5 H. & N. 725; 29 L. J. Ex. 320; *Re Newen (ubi supra)*; *Rhodes* v. *Fielder, Jones and Harrison*, 122 L. T. 128; 89 L. J. K. B. 15.

(*f*) *Godefroy* v. *Dalton*, 6 Bing., at p. 468; 8 L. J. C. P. 79; 31 R. R. 467. See also *Purves* v. *Landell*, 12 Cl. & Fin. 91; 69 R. R. 46; *Faithfull* v. *Kesteven*, 103 L. T. 56; *Fletcher & Son* v. *Jubb, Booth and Helliwell*, [1920] 1 K. B. 275; 89 L. J. K. B. 236; 122 L. T. 258; 36 T. L. R. 19 (a solicitor is bound to know the provisions of s. 1 of the Public Authorities Protection Act, 1893).

(*g*) *Simmons* v. *Rose*, 31 Beav. 1; 135 R. R. 316; *Asquith* v. *Asquith*, [1895] W. N. 31.

(*h*) *Liles* v. *Terry*, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; 73 L. T. 428; *Willis* v. *Barron*, [1902] A. C. 271; 71 L. J. Ch. 609; 86 L. T. 805.

(*i*) *Liles* v. *Terry (ubi supra)*; *Powell* v. *Powell*, [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84. See also Wilshere's Equity, Chapter X., s. 2.

any question of undue influence, that he has made full and complete disclosure of all material facts (*k*).

The liability of a solicitor to third persons upon contracts made by him on behalf of his client is governed by the ordinary rules relating to agency, so that he is not personally liable upon liabilities incurred by him for and with the authority of his client. Thus he is not liable for the expenses of witnesses whom he has caused to be subpœnaed (*l*), unless he specially pledges his own credit (*m*), nor is he liable to the sheriff's officer for his fees where he delivers a writ of *fieri facias* to the sheriff for execution (*n*). But he is liable where he himself as principal employs a person to do anything for which he makes a charge, as, for example, a law stationer; so also he is liable for the fees of the officers of the Court (*o*).

A solicitor is not, however, liable only to his client, but he is also, as an officer of the Court, subject to its disciplinary jurisdiction, and, as such, may be liable to proceedings of a penal character if he fails in his duty to the Court or his client (*p*). And he may, as an officer of the Court, be liable to third persons other than his client, as, *e.g.*, where by his negligence a fund in Court is improperly paid out to a third person (*q*). So also, where he takes or continues proceedings without any authority

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(*k*) *Moody* v. *Cox and Hatt*, [1917] 2 Ch. 71; 86 L. J. Ch. 424; 116 L. T. 740.

(*l*) *Robins* v. *Bridge*, 3 M. & W., at p. 119; 7 L. J. Ex. 49; 49 R. R. 531.

(*m*) *Lee* v. *Everest*, 2 H. & N. 285; 26 L. J. Ex. 334; 115 R. R. 536; *Evans* v. *Philpotts*, 9 C. & P. 270; *Hallet* v. *Mears*, 3 East, 15; 12 R. R. 296. A witness who is served with a subpœna is not bound to attend unless the whole necessary expenses of going to, staying at, and returning from the place of trial are tendered with the subpœna. And if he attends without being paid he is justified in refusing to be sworn until he is paid, though his refusal will not prevent him from recovering his necessary expenses of attendance from the party for whom he was subpœnaed (*ibid.*). An expert witness is also entitled to be paid for loss of time (*Webb* v. *Page*, 1 C. & K. 23; 70 R. R. 767).

(*n*) *Royle* v. *Busby*, 6 Q. B. D. 171; 50 L. J. Q. B. 196.

(*o*) *Robins* v. *Bridge* (*ubi supra*); *Ex p. Hartopp*, 12 Ves., at p. 352; see also *Cocks* v. *Bruce, Searle and Good*, 21 T. L. R. 62 (solicitor liable to shorthand-writer); compare *Wakefield* v. *Duckworth & Co.*, [1915] 1 K. B. 218; 84 L. J. K. B. 335; 112 L. T. 130; 31 T. L. R. 40, where a solicitor was held not to be personally liable for the price of photographs ordered for the purposes of a case, the photographer knowing that he was a solicitor and the purpose for which the photographs were required.

(*p*) *Re Haynes*, 15 Ch. D., at p. 52; 49 L. J. Bk. 62.

(*q*) *Re Dangar's Trusts*, 41 Ch. D. 178; 58 L. J. Ch. 315; 60 L. T. 491.

from his client or after his authority has determined, he is liable to pay the costs of the other party (*r*).

Lien of Solicitor.

1. *Common Law lien.*—A solicitor has a lien for his taxable costs, charges, and expenses upon all the papers of his client which have come into his hands *as solicitor*, but not for ordinary advances nor upon papers coming to him in some other capacity, *e.g.*, as mortgagee (*s*). But it is a *general lien*, not only for the costs of the particular business in the course of which the documents were used, but for other business also (*t*). And it is purely a *Common Law* lien: it depends, therefore, upon his actual possession of the papers and cannot be actively enforced. It creates no equitable charge, and is simply a right as against his client and persons claiming through the client, but not as against persons claiming by a right superior to that of the client, to retain the papers until the costs are satisfied (*u*).

2. *Equitable lien.*—A solicitor has an *equitable lien*, not depending upon possession (*x*), on any money (*y*) or costs which have become payable to his client as a result of litigation conducted by him. This is a particular lien, extending only to

(*r*) *Simmons* v. *Liberal Opinion, Ltd.*, [1911] 1 K. B. 966; 80 L. J. K. B. 617; 104 L. T. 264; 27 T. L. R. 278. See also *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479; 66 L. J. Ch. 230; 76 L. T. 111; *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649; 65 L. J. Ch. 823; and see *Fernée* v. *Gorlitz*, [1915] 1 Ch. 177; 84 L. J. Ch. 404, where a solicitor commenced an action on behalf of an infant by her next friend, who was also an infant, and was held personally liable for costs which the defendant had incurred in defending the action.

(*s*) *Sheffield* v. *Eden*, 10 Ch. D. 291; 40 L. T. 283; *Re Taylor, Stileman and Underwood*, [1891] 1 Ch. 590; 60 L. J. Ch. 525.

(*t*) *Re Taylor, Stileman and Underwood*, [1891] 1 Ch., at p. 599.

(*u*) See, as to the nature and extent of the lien, *Re Llewellin*, [1891] 3 Ch. 145; 60 L. J. Ch. 732; 65 L. T. 249; *Re Hawkes*, [1898] 2 Ch. 1; 67 L. J. Ch. 284. Where there is a change of solicitors during an action in which persons other than the plaintiff and the defendant may be interested, as, *e.g.*, actions for the administration of the estate of a deceased person, or for the administration of the trusts of a deed, or for dissolution of partnership, the first solicitor cannot assert his lien over papers that have come into his hands in the course of the action so as to embarrass the other persons interested in the proceedings, but must, without prejudice to his lien, produce them when they are required for the carrying on of the proceedings (*Re Boughton, Boughton* v. *Boughton*, 23 Ch. D. 169; 48 L. T. 413; *Boden* v. *Hensby*, [1892] 1 Ch. 101; 61 L. J. Ch. 174; 65 L. T. 744; *Dessau* v. *Peters, Rushton & Co.*, [1922] 1 Ch. 1; 91 L. J. Ch. 254; 126 L. T. 648).

(*x*) *Mercer* v. *Graves*, L. R. 7 Q. B., at p. 503; 41 L. J. Q. B. 212; 26 L. T. 551.

(*y*) Not realty (*Shaw* v. *Neale*, 6 H. L. C. 581; 27 L. J. Ch. 444).

the costs of the particular litigation (*z*), but it may be actively enforced by the Court by a charging order (*a*).

It does not, however, amount to an equitable assignment of, or a charge upon, the proceeds of the judgment (*b*); it is only a right to ask for the intervention of the Court for his protection when there is a probability of the client depriving him of his costs (*c*).

3. *Statutory lien.*—By s. 28 of the *Solicitors Act*, 1860, which does not take away the previous non-statutory liens (*d*), whenever a solicitor "is employed to prosecute or defend any such matter or proceeding in any court of justice (*e*), it shall be lawful for the court or judge before whom any such suit, etc., has been heard or shall be depending, to declare such . . . solicitor entitled to a *charge upon the property* (*f*) *recovered or preserved* . . . for the taxed costs, charges, and expenses of or in reference to such suit, etc., and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, etc., out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice (*g*), be absolutely void and of no effect against such charge or right."

(*z*) *Hall* v. *Laver*, 1 Hare, 571; 58 R. R. 198.

(*a*) *Hamer* v. *Giles*, 11 Ch. D. 942; 48 L. J. Ch. 508.

(*b*) *Mercer* v. *Graves* (*ubi supra*); see also *Ex p. Morrison*, L. R. 4 Q. B., at p. 156; 38 L. J. Q. B. 65.

(*c*) *Mercer* v. *Graves* (*ubi supra*).

(*d*) *Re Born*, [1900] 2 Ch., at p. 435; 69 L. J. Ch. 669; 83 L. T. 51.

(*e*) The Act applies only to property recovered in a Court of Justice and in civil proceedings, not where it has been recovered by negotiation without litigation (*Meguerditchian* v. *Lightbound*, [1917] 2 K. B. 298; 86 L. J. K. B. 889; 116 L. T. 790), or as an indirect result of criminal proceedings (*Re Humphreys*, [1898] 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182). And the property must be recovered or preserved by the exertions of the solicitor who is asking for the charging order (*Wingfield* v. *Wingfield*, [1919] 1 Ch., at p. 471; 88 L. J. Ch. 229; 120 L. T. 588).

(*f*) The Act includes realty (*Ex p. Tweed*, [1899] 2 Q. B. 167; 68 L. J. Q. B. 794; 81 L. T. 1); and money paid into Court under Order XVI to abide the event (*Moxon* v. *Sheppard*, 24 Q. B. D. 627; 59 L. J. Q. B. 286; 62 L. T. 726); and costs paid by order of the Court below and ordered by the Court of Appeal to be refunded (*Guy* v. *Churchill*, 35 Ch. D. 489; 56 L. J. Ch. 670; 57 L. T. 510); but not money paid into Court as security for costs (*Re Wadsworth, Rhodes* v. *Sugden*, 29 Ch. D. 517; 52 L. T. 613; 54 L. J. Ch. 638).

(*g*) Notice that the subject-matter of an assignment is the subject-matter

A charging order under the Act binds all property which is under the jurisdiction of the Court in the action at the time when the order is made (*h*). A charging order may, therefore, be made upon property which, by reason of the employment of the solicitor, is recovered or preserved for the benefit of a person who did not, or could not—as, *e.g.*, in the case of an infant—employ the solicitor (*i*), or was not a party to the litigation (*k*). The charge depends upon the idea of salvage; and, therefore, when there is a change of solicitors, the solicitor who is last employed is entitled to a charge in priority to his predecessors (*l*). It is a charge only for the costs of recovering the particular property, not for all costs due from the client; and where a solicitor recovers a fund for his client he obtains no greater rights by actually getting it into his possession than if it had remained in Court (*m*). The assignee of the solicitor has the same rights to a charging order as the solicitor himself (*n*).

Lien of London agent.—Where a London agent is employed by a country solicitor he has, as against the deeds of, or a fund recovered for, a client of the latter, all the foregoing rights: (i) as against the country solicitor for all costs for agency business and disbursements due from him, whether in the particular action or in any other proceedings; but (ii) as against the client only for the costs of the particular action (*o*). If, however, the client settles with the country solicitor (by payment, set-off, or otherwise) without notice of the London agent's rights, such rights are lost (*p*).

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of a suit amounts to notice of the existence of the solicitor's right, and prevents the assignee from being a purchaser for value without notice (*Cole* v. *Eley*, [1894] 2 Q. B. 350; 63 L. J. Q. B. 682; 70 L. T. 892).

(*h*) *Re Suffield and Watts*, 20 Q. B. D., at p. 699; 58 L. T. 911; 5 Morrell, 83.

(*i*) *Greer* v. *Young*, 24 Ch. D., at pp. 542, 543; 52 L. J. Ch. 915; 49 L. T. 224; *Scholey* v. *Peck*, [1893] 1 Ch., at p. 711; 62 L. J. Ch. 658; 68 L. T. 118.

(*k*) As, *e.g.*, in administration proceedings, where the property is recovered or preserved for all parties interested in the estate (see *Wingfield* v. *Wingfield*, *ubi supra*).

(*l*) *Re Knight*, [1892] 2 Ch. 368; 61 L. J. Ch. 399; 66 L. T. 646.

(*m*) *Mackenzie* v. *Mackintosh*, 64 L. T. 706.

(*n*) *Briscoe* v. *Briscoe*, [1892] 3 Ch. 543; 61 L. J. Ch. 665; 67 L. T. 116.

(*o*) *Lawrence* v. *Fletcher*, 12 Ch. D. 858; and see *Re Jones*, [1905] 2 Ch. 219; 74 L. J. Ch. 458.

(*p*) *Cockayne* v. *Harrison*, L. R. 15 Eq. 298; 42 L. J. Ch. 660.

Partners.—The law relating to partnership was for the most part codified by the Partnership Act, 1890. But the *Limited Partnerships Act*, 1907, has since enabled a special type of partnership to be formed, which differs in many respects from an ordinary or general partnership. A limited partnership under this Act must consist of one or more persons, called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons, to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property *valued at a stated amount*, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed. A limited partner shall not, during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of his contribution, and, if he does so, shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back (*q*).

Every limited partnership must be registered as such in accordance with the provisions of the Act, or in default it will be deemed to be a general partnership, and every limited partner will be deemed to be a general partner (*r*).

Definition of partnership.—"Partnership is the relation which subsists between persons carrying on a business in common with a view of profit" (*s*).

But the relation between members of any company or association which is—

(a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being

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(*q*) 7 Edw. 7, c. 24.

(*r*) *Id.*, s. 5. On registration a statement must be filed, signed by the partners, and stamped with 5s. per cent. on the contributions of the limited partners, giving particulars of the firm's name, the nature and place of its business, the full name of each partner, the commencement and duration of the partnership, and who are the limited partners, and how much each contributes in cash or otherwise. Any changes in a limited partnership must also be registered; and advertisements must be issued in the *Gazette* if a general partner becomes a limited partner or a limited partner assigns his share. Anyone may inspect the register and demand certified copies of any entries therein (*id.*, ss. 8, 11—16).

(*s*) 53 & 54 Vict. c. 39, s. 1 (1) (b). References, unless otherwise specified, are to this Act.

in force and relating to the registration of joint stock companies (*t*); or

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act (*u*).

"In determining whether a partnership does or does not exist, regard shall be had to the following rules (*x*):—

"(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not *of itself* create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

"(2) The sharing of *gross returns* does not *of itself* create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

"(3) The receipt by a person of a share of the *profits* of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

"(a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not *of itself* make him a partner in the business or liable as such;

"(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not *of itself* make the servant or agent a partner in the business or liable as such;

"(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased

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(*t*) The law relating to joint stock companies was consolidated by the Companies (Consolidation) Act, 1908.

(*u*) S. 1 (2).

(*x*) S. 2.

person was a partner, is not, *by reason only of such receipt*, a partner in the business or liable as such;

" (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not *of itself* make the lender a partner with the person or persons carrying on the business or liable as such. *Provided that the contract is in writing and signed by or on behalf of all the parties thereto;*

" (e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not, *by reason only of such receipt*, a partner in the business or liable as such."

With regard, however, to paragraphs (d) and (e), it is provided that in the event of any such borrower of money, or purchaser of a goodwill, becoming bankrupt, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying insolvent, the lender of such money, or the vendor of such goodwill, shall not be entitled to recover anything in respect of his loan, or of the share of profits contracted for, until the claims of the other creditors for valuable consideration in money, or money's worth, have been satisfied (*y*). It has been held that this provision applies to the case of a contract for the loan of money at interest varying with the profits, notwithstanding that the contract is not in writing (*z*). It has also been held that where a goodwill is sold in consideration of the payment by the purchaser of an annuity which is not expressly stated to be payable out of the profits of the business, the provisions of the Act do not apply (*a*). The section does not deprive a lender of any security he may have taken for his loan (*b*).

The effect of the definition and rules is that to constitute

(*y*) S. 3.
(*z*) *Re Fort, ex p. Schofield*, [1897] 2 Q. B. 495; 66 L. J. Q. B. 824; 77 L. T. 274.
(*a*) *Re Gieve, ex p. Shaw*, 80 L. T. 737; 6 Manson, 249.
(*b*) *Ex p. Sheil*, 4 Ch. D. 789; 46 L. J. Bk. 62.

partnership—(i) there must be an association formed for the purpose of making profit (*c*); (ii) the object of the association must be the carrying on of a series of acts constituting a business (*d*); (iii) the business must be carried on in common, *i.e.*, so as to create the relationship of principal and agent, each partner being both principal and agent (*e*); (iv) neither co-ownership (*f*) nor the sharing of gross returns (*g*) of itself constitutes partnership; (v) sharing the net profits of a business is evidence from which the existence of partnership may be inferred as a fact (*h*); but this evidence may be negatived by other facts, and the Court must in each case determine what was the real intent of the parties and the nature of the transaction as a whole (*i*).

Formation of partnership. Number of partners.—Subject to *s.* 4 of the *Statute of Frauds* (*k*), a partnership may be created in any manner. By *s.* 1 of the *Companies* (*Consolidation*) *Act*, 1908, if the number of partners exceeds ten in the case of a banking business, or twenty in the case of any other business, it must be registered under that Act, unless it is formed in pursuance of some other Act, or of letters patent, or is engaged in working mines within and subject to the jurisdiction of the Stannaries.

Persons who have entered into partnership are for the purposes of the Act called collectively a *firm*, and the name under which

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(*c*) See *Wise* v. *Perpetual Trustee Co.*, [1903] A. C. 149; 72 L. J. P. C. 31; 87 L. T. 569; 19 T. L. R. 125.

(*d*) *Smith* v. *Anderson*, 15 Ch. D., at p. 277; 50 L. J. Ch. 39; 43 L. T. 329. By s. 45 the expression "business" includes "every trade, occupation or profession."

(*e*) See *Cox* v. *Hickman*, 8 H. L. C. 268; 30 L. J. C. P. 125; 125 R. R. 148; *Walker* v. *Hirsch*, 27 Ch. D. 460; 54 L. J. Ch. 315; 51 L. T. 581.

(*f*) See *French* v. *Styring*, 2 C. B. (N.S.) 354; 26 L. J. C. P. 181. Two persons may, however, be partners in a business carried on upon land of which they are co-owners, though they are not partners in respect of the land (*Steward* v. *Blakeway*, 4 Ch. 603; compare *Waterer* v. *Waterer*, 15 Eq. 402).

(*g*) *Lyon* v. *Knowles*, 3 B. & S. 556; 32 L. J. Q. B. 71; 129 R. R. 452.

(*h*) *Mollwo March & Co.* v. *Court of Wards*, L. R. 4 P. C. 419.

(*i*) *Davis* v. *Davis*, [1894] 1 Ch. 393; 63 L. J. Ch. 219; *Adam* v. *Newbigging*, 13 A. C., at p. 315; 57 L. J. Ch. 1066; 59 L. T. 267. "The Court looks at the transaction and says, 'Is this, in point of law, really a partnership'" (*Weiner* v. *Harris*, [1910] 1 K. B., at p. 290; 69 L. J. K. B. 842; 101 L. T. 647; 26 T. L. R. 96). For illustrations of these points, see Wilshere's Equity, Chapter VIII.

(*k*) *Ante*, p. 68.

their business is carried on is called the firm name (*l*). But though the firm name may be used for certain purposes, a firm does not, like a company (*m*), become a new legal person distinct from the persons who compose it: it remains an aggregate of individuals, each of whom, except in the case of a limited partnership, is liable for all the debts of the firm.

There is nothing to prevent an infant from becoming a partner, and until he disaffirms the contract of partnership he is a member of the firm and entitled to all the benefits resulting from the partnership (*n*). But he cannot contract debts by trading, and therefore does not become liable for the debts of the firm. The adult partners are, however, entitled to insist that the partnership assets shall be applied in payment of the debts of the firm, and that until this is done no part of them shall be received by the infant (*o*).

Liabilities of partners to outsiders.—"Every partner is an agent of the firm and his other partners *for the purpose of the business of the partnership*; and the acts of every partner who does any act for carrying on, *in the usual way*, business *of the kind carried on* by the firm of which he is a member, bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, *and* the person with whom he is dealing *either* knows that he has no authority *or* does not know or believe him to be a partner" (*p*).

"An act or instrument relating to the business of the firm

(*l*) S. 4. By s. 1 of the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), every *firm* having a place of business in the United Kingdom and carrying on business under a business name which does not consist of the true names of all the partners, and also every *individual* who carries on business under a business name which does not consist of his true surname, and every *individual* or *firm* who, or a member of which, has changed his name, must furnish to the registrar the particulars required by s. 3. Any contract made by a person in default and relating to the business in respect of which he is in default is unenforceable by action, though the Court may, in certain circumstances, grant relief (s. 8). See Wilshere's Equity, Chapter VIII.

(*m*) See *Salomon* v. *Salomon & Co.*, [1897] A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426.

(*n*) *Goode* v. *Harrison*, 5 B. & Ald. 147; 24 R. R. 307.

(*o*) *Lovell and Christmas* v. *Beauchamp*, [1894] A. C., at p. 111; 63 L. J. Q. B. 802; 71 L. T. 587. If one member of a firm is an infant, judgment cannot be recovered against the firm simply, but must be against the firm other than the infant (*id.*).

(*p*) S. 5.

and done or executed in the firm name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any rule of law relating to the execution of deeds or negotiable instruments " (*q*).

" Where one partner pledges the credit of the firm for a purpose *apparently* not connected with the firm's ordinary course of business, the firm is not bound unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner " (*r*).

" If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no action done in contravention of the agreement is binding on the firm with respect to persons *having notice* of the agreement " (*s*).

" Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. Provided that where, after a partner's death, the partnership business is continued in the old firm name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors or administrators, estate, or effects liable for any partnership debts contracted after his death " (*t*).

A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm, provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the

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(*q*) S. 6. See *ante*, p. 235. A deed executed by one partner on behalf of the firm, though invalid as a deed, may be good as an equitable assignment (*Marchant* v. *Morton*, [1901] 2 K. B. 829; 70 L. J. K. B. 820).

(*r*) S. 7.

(*s*) S. 8.

(*t*) S. 14.

state and prospects of the partnership business, and may advise with the partners thereon.

If a limited partner takes part in the management of the partnership business, he shall be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner (*u*).

From the above sections it will be seen that, following the ordinary rules applicable to agency, but subject to exceptions in the case of limited partners, every partner is liable for all acts of his partners which are done by them as his agents, and with his ostensible authority. Every partner, whether an active or dormant partner, is liable for all the acts of his partners that are within the authority which, from the nature of the particular business, they may be presumed to possess and no private arrangements can limit that authority (*x*). But the firm is not liable if the person dealing with a partner knows that he has no authority or, not knowing that he is a partner, contracts with him personally. And the implied authority is limited to acts that are "apparently" within the ordinary course of business, so that if a partner does an act which apparently is for his private purposes, the other partners are not liable unless he has actual authority or they are estopped from denying his authority or have ratified his act. Thus, a negotiable instrument given or indorsed in the firm's name, by one partner in a trading concern, for a transaction of the firm, will ordinarily bind the firm, though it will not be so in the case of a non-trading firm, *e.g.*, a firm of solicitors, unless the partner had actual authority, as the giving or indorsing of negotiable instruments is not within the ordinary course of such a business (*y*). One partner has no implied authority to bind his firm by a submission to arbitra-

(*u*) Limited Partnerships Act, 1907, s. 6 (1).

(*x*) *Cox* v. *Hickman*, 8 H. L. C., at pp. 304, 305; 30 L. J. C. P. 125; 125 R. R. 148.

(*y*) *Hedley* v. *Bainbridge*, 3 Q. B. 316; 11 L. J. Q. B. 293; 61 R. R. 239; *Garland* v. *Jacomb*, L. R. 8 Ex. 216; 28 L. T. 877. And where an agent in a non-trading firm has authority to draw *cheques*, the firm is not bound by a post-dated cheque drawn by him, such a cheque being equivalent to a bill of exchange (*Forster* v. *Mackreth*, L. R. 2 Ex. 163; 36 L. J. Ex. 94). As to the power of a member of a firm of solicitors to bind his partners, see also *Harman* v. *Johnson*, 2 E. & B. 61; 22 L. J. Q. B. 297 (receipt of money for investment); *Plumer* v. *Gregory*, 18 Eq. 621; 43 L. J. Ch. 616; 31 L. T. 80 (borrowing of money).

tion (*z*), nor by borrowing money, unless, in the case of a trading firm, the money is properly borrowed for the purposes of the business (*a*), nor by giving a guarantee unless it is necessary for and within the apparent scope of the partnership business (*b*), which is not so in the case of a firm of solicitors (*c*).

Nature of partners' liability.—A. *Debts and obligations.*—"Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts" (*d*).

A limited partner is prima facie liable only to the extent of his contribution (*e*).

Partners are *joint debtors*; accordingly a partner has a right to demand that his other partners shall be made co-defendants with him. If this has not been done and a judgment is obtained against one partner, it is a bar to any further proceedings against another surviving partner (*f*) arising out of the same cause of action (*g*), because, since the debt was joint, there was only *one* cause of action, which had become merged in the judgment.

Liability of incoming and outgoing partners.—"A person who is admitted as a partner into an existing firm does not *thereby* become liable to the creditors of the firm for anything done

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(*z*) *Stead* v. *Salt*, 3 Bing. 101; 3 L. J. C. P. 175; 28 R. R. 602.
(*a*) *Plumer* v. *Gregory* (*ubi supra*).
(*b*) *Brettel* v. *Williams*, 4 Ex. 623; 19 L. J. Ex. 121; 80 R. R. 726.
(*c*) *Hasleham* v. *Young*, 5 Q. B. 833; 13 L. J. Q. B. 205.
(*d*) S. 9.
(*e*) *Ante*, p. 255.
(*f*) *Re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; *Kendall* v. *Hamilton*, 4 A. C. 504; 48 L. J. C. P. 705; 41 L. T. 418. In the latter case A and B carried on business as partners, and borrowed money from C, who sued them and recovered judgment, but the judgment was unsatisfied owing to the insolvency of A and B. C *subsequently* discovered that D at the time of the loan was an undisclosed partner of A and B, and sued him for the debt. *Held*, that the judgment against A and B was a bar to any action against D. See also *McLeod* v. *Power*, [1898] 2 Ch. 295; 67 L. J. Ch. 551; 79 L. T. 67.
(*g*) *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1. *Held*, in this case, that a judgment against one joint contractor on a cheque given by him alone for the joint debt was not a bar to an action against the other joint contractor on the original contract, the causes of action not being the same.

before he became a partner. A partner who retires from a firm does not *thereby* cease to be liable for partnership debts or obligations incurred before his retirement. A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted " (*h*).

Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has notice of the change. But an advertisement in the *Gazette* is sufficient notice as to persons who had *not* dealings with the firm before the date of the dissolution or change so advertised. The estate of a partner who dies, or who becomes bankrupt, or of a partner who, *not* having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively (*i*).

B. *Delicts and misapplication of money or property.*—" Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act " (*k*).

" Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives money or property of a third person, and the money or

(*h*) S. 17. Thus, if A, B and C are partners and D enters in place of C the liability of A, B and C towards *existing creditors* can be affected only by a novation (*ante*, p. 169) creating a new agreement between such creditors and the new firm. Towards *new creditors* the new firm is ordinarily alone liable, but a partner who has retired may remain liable if he has not given notice of his retirement and he must give individual notice to old customers (*Re Hodgson*, 31 Ch. D., at p. 184; 55 L. J. Ch. 241; 54 L. T. 222). A dormant partner " may retire from a firm without giving notice to the world " (*Heath* v. *Sansom*, 4 B. & Ad. 172; 2 L. J. K. B. 25; 38 R. R. 237. See also *Carter* v. *Whalley*, 1 B. & Ad. 11; 8 L. J. (o.s.) K. B. 340; 35 R. R. 199).

(*i*) S. 36.

(*k*) S. 10.

property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss " (*l*).

" Every partner is liable jointly with his co-partners and also severally for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding sections " (*m*).

Duties and liabilities of partners to each other.—The following rules are laid down by the Act (*n*), *subject to any express or implied agreement to the contrary*:—

All partners are entitled to share equally in the capital and profits, and must contribute equally towards the losses.

The firm must indemnify every partner in respect of payments made and liabilities incurred by him in the ordinary and proper conduct of the firm's business *or* in anything necessarily done for the preservation of the business or property of the firm.

Every partner, *other than a limited partner*, may take part in the management of the business. Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners (or in a limited partnership by the majority of the *general partners*) (*o*), but no change may be made in the nature of the business without the consent of all the partners.

Partners are bound to render to each other true accounts and full information of everything affecting the partnership (*p*).

" Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection " (*q*).

" If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business " (*r*).

(*l*) S. 11. (*m*) S. 12.
(*n*) S. 24.
(*o*) Limited Partnerships Act, 1907, s. 6 (5) (a).
(*p*) S. 28.
(*q*) S. 29.
(*r*) S. 30. As to this and the last section, see *Aas* v. *Benham*, [1891] 2 Ch. 244; 65 L. T. 25

Assignment of share in partnership.—No person may be introduced into a *general* partnership without the consent of all existing partners, but in the case of a *limited* partnership a person may be introduced as a partner without the consent of the existing limited partners (*s*). An assignment by a *general* partner of his share does not make the assignee a partner, but only entitles him to receive the share of profits to which the assignor would otherwise be entitled (*t*): but a *limited* partner may, with the consent of the general partners, assign his share so as to make his assignee a limited partner (*u*).

Dissolution of partnership.—Subject to any agreement between the partners, a partnership is dissolved:—

i. If entered into for a fixed term or a single undertaking, by the expiration of the term or termination of the undertaking (*x*).

ii. If entered into for an undefined time, by notice given by any *general* partner, but not by notice given by a limited partner (*y*). Where the partnership is not for a fixed term, any partner may at any time retire on giving notice (*z*).

iii. By the death or bankruptcy of any *general,* but not limited, partner or (at the option of the other partners) by any general, but not limited, partner allowing his share to be charged under the Act for his separate debt (*a*). An executor of a deceased person *may* become a partner under a provision to that effect in the partnership articles, but he cannot by any such provision be compelled to do so (*b*). For if he becomes a member of the firm, he is personally liable to the same extent

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(*s*) S. 24 (7). Limited Partnerships Act, 1907, s. 6 (5) (d).
(*t*) S. 31.
(*u*) Limited Partnerships Act, 1907, s. 6 (5) (b).
(*x*) S. 32.
(*y*) *Id.*, and s. 6 (5) (e) of the 1907 Act.
(*z*) S. 26.
(*a*) S. 33 and s. 6 (2) of the Act of 1907. By s. 22 it is provided that a writ of execution may not issue against partnership property except in a judgment against the firm, but that the Court may, on the application of a judgment creditor of a partner, make an order charging his interest with the debt and costs, and may appoint a receiver of his share.
(*b*) *Lancaster* v. *Allsup,* 57 L. T. 53.

as any other member, although he is simply acting as trustee (*c*).

"A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership" (*d*).

A partnership may be dissolved by the Court (*e*): (i) on the lunacy of a *general* partner, but not on the lunacy of a limited partner, unless his share cannot otherwise be realised; (ii) if a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the contract, *or* is guilty of conduct calculated to prejudice the carrying on of the business *or* wilfully commits a breach of the partnership agreement, or otherwise so conducts himself in relation to the business that it is not practicable to carry it on with him; (iii) if the business can only be carried on at a loss; (iv) if any circumstances render a dissolution just and equitable.

After dissolution, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue so far as may be necessary to wind up the partnership affairs and to complete transactions begun, but unfinished, at the date of the dissolution, but not otherwise (*f*). Thus, if one partner dies the survivor may continue the business for the purpose of winding it up, and may sell or mortgage the partnership property for the purpose of paying its liabilities (*g*).

A firm is in no case bound by the act of a partner who has become bankrupt, but this does not affect the liability of any person who has after the bankruptcy represented himself, or knowingly suffered himself to be represented, as a partner of the bankrupt (*h*).

On the dissolution of a limited partnership, its affairs are wound up by the general partners, unless the Court otherwise

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(*c*) *Wightman* v. *Townroe*, 1 M. & S. 412; 14 R. R. 475. He is, however, entitled to indemnity out of his testator's estate if he has acted properly (*Lumsden* v. *Buchanan*, 4 Macq. H. L. 950; 149 R. R. 392).
(*d*) S. 34.
(*e*) S. 35.
(*f*) S. 38.
(*g*) *Re Bourne*, [1906] 2 Ch. 427; 75 L. J. Ch. 779; 95 L. T. 131.
(*h*) S. 38.

orders (*i*); if it is wound up by the Court, the procedure is regulated by the Bankruptcy Act, 1914 (*i*).

On dissolution of a partnership, every partner is entitled to have its property applied in payment of its debts and liabilities, and to have the surplus assets applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may apply to the Court to wind up the business (*k*). The goodwill of the business is part of the assets, and in the absence of any contrary provision in the partnership agreement it must be sold with the remaining assets (*l*); if it is not sold, each partner may, in the absence of any contrary agreement, carry on business under the firm name, provided that he does not do it in such a manner as to expose the others to any liability (*m*).

Subject to any contrary agreement, the following rules are observed in settling accounts after a dissolution:—

1. Losses are paid first out of profits, next out of capital, and lastly by the partners individually in the proportion in which they were entitled to share profits.

2. The assets must be applied (a) in paying the debts of the firm to outsiders; (b) in repayment of advances made by any partner to the firm; (c) in repayment of the capital contributed by each partner. The residue is divided among the partners in the proportion in which profits are divisible (*n*).

One partner could not, at Common Law, sue another upon any matter involving the partnership accounts (*o*), and the proper remedy between partners was formerly by proceedings in

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(*i*) Limited Partnerships Act, 1907, s. 6 (3). The provisions of s. 6 (4) are repealed, and by s. 127 of the Bankruptcy Act, 1914, the provisions of that Act, subject to rules made thereunder, apply to limited partnerships as if they were general partnerships.

(*k*) S. 39.

(*l*) *Thynne* v. *Shove*, 45 Ch. D., at p. 577; 59 L. J. Ch. 509; 62 L. T. 803; *Burchell* v. *Wilde*, [1900] 1 Ch., at p. 558; 69 L. J. Ch. 314; 82 L. T. 576; 16 T. L. R. 257.

(*m*) *Burchell* v. *Wilde* (*ubi supra*).

(*n*) S. 44. For the remaining sections of the Partnership Acts, see Wilshere's Equity.

(*o*) See Bullen & Leake (3rd ed.), p. 229. But one partner might sue another for his share of the produce of the partnership business, after a final account had been stated and a balance acknowledged to be due (*ibid.*).

the Court of Chancery. By *s.* 34 of the *Judicature Act*, 1873, re-enacted by *s.* 56 of the *Judicature Act*, 1925, the taking of partnership accounts was assigned to the Chancery Division.

Section 2.—*Master and Servant.*

Formation of the contract.—A contract of hiring and service which cannot be performed within one year falls within s. 4 of the Statute of Frauds (*p*). Otherwise no special form or evidence is necessary, and it may be in writing or verbal, and may be expressed or inferred from circumstances.

Where no time for the duration of the contract is fixed, it is called a general hiring, and is presumed to be a hiring by the year (*q*). But this is merely a presumption of fact, not of law, which may be rebutted by any evidence showing that an annual hiring was not intended, as, *e.g.*, by a provision for the payment of weekly wages (*r*). If the rate of remuneration is not fixed, the servant can recover a reasonable amount, provided that there was a contract that some remuneration should be paid (*s*).

Relationship between master and servant.—The rights, duties, and liabilities of master and servant depend upon the contract between them, except in so far as they are implied by law or created by express statutory enactment. It is the duty of the master to employ and pay (*t*) the servant in accordance with the

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(*p*) *Ante*, p. 68.

(*q*) *Turner* v. *Robinson*, 5 B. & Ad. 789; 39 R. R. 650; *Fawcett* v. *Cash*, 5 B. & Ad., at p. 907; 3 L. J. K. B. 113; 39 R. R 709. A general hiring is not within s. 4 of the Statute of Frauds. A contract to remain in the service of the employer during the life of either is not invalid as being in restraint of trade (*Wallis* v. *Day*, 2 M. & W. 273; 6 L. J. Ex. 92; 46 R. R. 602). It has been said, however, that such a contract must be by deed (see 2 M. & W., at p. 281).

(*r*) *Fairman* v. *Oakford*, 5 H. & N. 635; 29 L. J. Ex. 459; 120 R. R. 747; *Baxter* v. *Nurse*, 6 Man. & G. 935; 13 L. J. C. P. 82; 64 R. R. 891.

(*s*) *Bryant* v. *Flight*, 5 M. & W. 114. Here it was clear that some remuneration was to be paid, though the amount was left to the master. But where the question whether *any* remuneration was to be paid was left to the master it was held that the plaintiff could recover nothing (*Taylor* v. *Brewer*, 1 M. & S. 290; 21 R. R. 831). See also *Bayley* v. *Rimmell*, 1 M. & W. 506; *Bud* v. *McGahey*, 2 C. & K. 707.

(*t*) By the Truck Act, 1831 (1 & 2 Will. 4, c. 37), and the Amendment Acts of 1887 (50 & 51 Vict. c. 46), 1896 (59 & 60 Vict. c. 44), provisions are made prohibiting the payment of workmen in goods or otherwise than in current coin, or contracts with workmen obliging them to spend their wages at any particular place, or certain deductions from their wages. The payment of wages in public houses is also prohibited by statute (46 & 47 Vict. c. 31).

contract, and it is the duty of the servant to perform the work for which he is employed, and to obey all lawful orders of the master; and for breach by either party of his duty an action will lie. The remedy of specific performance is not applicable to contracts for personal services (*u*); but a master may obtain an injunction restraining a servant from doing that which he has expressly stipulated not to do, *e.g.*, from breach of an express agreement that he will not, during the continuance of his employment, do similar work for any other master (*x*).

Disputes between masters and workmen, when the amount claimed does not exceed £10, may be heard by a Court of summary jurisdiction (*y*).

In the absence of agreement to that effect, a master is not bound to supply his servant with food, clothing, lodging or medical aid (*z*). If, however, a master calls in his own medical man to attend a servant, he cannot deduct payment therefor out of the servant's wages, unless there is a special contract that he should do so (*a*). So long as the contract between master and servant remains in force a servant is entitled to his remuneration, even though through illness he has been unable to work, provided that, but for his illness, he was ready and willing to do so (*b*).

Termination of the contract.—The contract between master and servant may be discharged in the same way as any other contract. In particular, it may come to an end:—

Where by agreement a master can retain a servant's wages on breach by him of certain regulations the servant must have an opportunity of being heard before his wages can legally be forfeited (*Armstrong* v. *South London Tramways Co.*, 64 L. T. 96).

(*u*) *Frith* v. *Frith*, [1906] A. C., at pp. 261, 262; 75 L. J. P. C. 50; 90 L. T. 383; 22 T. L. R. 388.

(*x*) *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J. Ch. 898; 91 R. R. 193. See Wilshere's Equity, Chapter XIV.

(*y*) Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. The Act does not apply to domestic servants (s. 10).

(*z*) *Wennall* v. *Adney*, 3 B. & P. 247; 6 R. R. 780. It is otherwise, however, with regard to an apprentice (*R.* v. *Smith*, 8 C. & P. 153). A master who, being legally liable to provide food, clothing, lodging or medical aid to a servant or apprentice, wilfully and without lawful excuse neglects or refuses to provide the same, so that the health of such servant or apprentice is likely to be permanently injured, is guilty of a criminal offence: Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 26; Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), s. 6.

(*a*) *Sellen* v. *Norman*, 4 C. & P. 80.

(*b*) *Cuckson* v. *Stones*, 1 E. & E., at p. 256; 28 L. J. Q. B. 25; 117 R. R. 196. See also *post*, p. 271.

1. By the death of either the master or the servant (*c*). In the case of a servant in the employment of a firm it may also, in the absence of any agreement to the contrary, be determined by the dissolution of the firm through the death or retirement of one of the firm (*d*).

2. By any alteration of the conditions of service so as to impose additional risk upon the servant. Thus, where a seaman contracted to serve on a ship belonging to the Japanese Government, it was held that he was justified in leaving the ship during the voyage on hearing that Japan had declared war upon China, the voyage having been, by the act of his employer, converted from one with the risks incident to peace into one with those incident to war (*e*).

3. By notice. If no length of notice is agreed, it is a rule of *law* that an agreement to give reasonable notice must be implied; but what is reasonable notice is in each case a question of fact for the jury (*f*), subject to any evidence as to usage in the particular class of employment (*g*). Reasonable notice may therefore vary from one month in the case of a clerk (*h*) to twelve months in the case of an editor (*i*). In the case, however, of a menial or domestic servant (*k*), there is a custom that the servant may at any time be dismissed by paying a calendar month's wages or giving a calendar month's notice (*l*). There is also a custom that

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(*c*) *Farrow* v. *Wilson*, L. R. 4 C. P. 744; 38 L. J. C. P. 326; 20 L. T. 810.

(*d*) *Brace* v. *Calder*, [1895] 2 Q. B. 253; 64 L. J. Q. B. 852; 72 L. T. 829.

(*e*) *O'Neil* v. *Armstrong*, [1895] 2 Q. B. 418; 65 L. J. Q. B. 7; 73 L. T. 178. See also *Liston* v. *Carpathian (Owners)*, [1915] 2 K. B. 42; 84 L. J. K. B. 1135; 110 L. T. 994; 31 T. L. R. 226.

(*f*) *Creen* v. *Wright*, 1 C. P. D., at p. 595; 46 L. J. C. P. 427; 35 L. T. 339; *Payzu, Ltd.* v. *Hannaford*, [1918] 2 K. B., at p. 350; 87 L. J. K. B. 1017; 119 L. T. 282; 34 T. L. R. 442.

(*g*) *Brennan* v. *Gilbart-Smith*, 12 T. L. R. 284.

(*h*) *Vibert* v. *Eastern Telegraph Co.*, 1 C. & E. 17.

(*i*) *Grundy* v. *Sun Printing Association*, 35 T. L. R. 77. See also *Lowe* v. *Walter*, 12 T. L. R. 358, in which a jury found that six months' was a reasonable notice in the case of a foreign correspondent of a newspaper.

(*k*) Whether or not a servant is a menial or domestic servant is a question of law (*Nicoll* v. *Greaves*, 17 C. B. (N.S.) 27; 33 L. J. C. P. 259). A huntsman has been held to fall within this category (*ibid.*), also a head gardener (*Nowlan* v. *Ablett*, 2 C. M. & R. 54; 4 L. J. Ex. 155), but not a farm bailiff (*Louth* v. *Drummond*, cited 17 C. B. (N.S.), at p. 38), nor a governess (*Todd* v. *Kerrich*, 8 Ex. 151; 22 L. J. Ex. 1).

(*l*) *Fawcett* v. *Cash*, 5 B. & Ad., at p. 909; 3 L. J. K. B. 113; 39 R. R. 709; *Turner* v. *Mason*, 14 M. & W., at p. 116; 14 L. J. Ex. 111; 69 R. R.

the service may be determined at the end of the first month by notice given at or before the end of the first fortnight (*m*).

4. By dismissal without notice. Such a dismissal is in point of law justifiable only if the servant has been guilty of conduct incompatible with the relationship of master and servant, or with the due and faithful discharge of his duties, or if his conduct is so immoral that he cannot be trusted (*n*); but not if he has been guilty merely of trivial misconduct, such as a single case of slight insolence or occasional neglect or a temporary absence (*o*). There is, however, no rule of law defining the degree of misconduct which will justify dismissal without notice, and it is in each case a question of fact whether the degree of misconduct is inconsistent with the fulfilment of the express or implied conditions of service (*p*). A person who is employed as a skilled servant may also be discharged without notice if he has not the necessary skill (*q*). Permanent disability from illness is also a sufficient ground for dismissal without notice (*r*), but not temporary disability, unless it goes to the root of the contract (*s*).

5. By the servant leaving without notice.

Effects of termination.—A servant properly dismissed without notice or leaving without notice does not forfeit any wages that have actually accrued due, but in the latter case the master may have a counterclaim for damages for breach of contract (*t*).

670; *Phipps & Co.* v. *Rogers*, [1925] 1 K. B., at p. 23; 93 L. J. K. B. 1009; 132 L. T. 240.

(*m*) *George* v. *Davies*, [1911] 2 K. B. 445; 80 L. J. K. B. 924. Judicial notice may now be taken of this custom, which formerly was required to be proved in each case, see *Moult* v. *Halliday*, [1898] 1 Q. B. 125; 77 L. T. 794; 67 L. J. Q. B. 451.

(*n*) *Edwards* v. *Levy*, 2 F. & F. 97; *Callo* v. *Brouncker*, 4 C. & P. 518; *Pearce* v. *Foster*, 17 Q. B. D., at pp. 539, 540; 55 L. J. Q. B. 306; 54 L. T. 664; and as to moral misconduct, see *Atkin* v. *Acton*, 4 C. & P. 208.

(*o*) *Edwards* v. *Levy*, *Callo* v. *Brouncker* (*ubi supra*); *Fillieul* v. *Armstrong*, 7 Ad. & E. 557; 7 L. J. Q. B. 7 (temporary absence). Compare *Turner* v. *Mason*, 14 M. & W. 112; 14 L. J. Ex. 311; 69 R. R. 670; *Churchward* v. *Chambers*, 2 F. & F. 229 (isolated instances of gross disobedience).

(*p*) *Baster* v. *London and County Printing Works*, [1899] 1 Q. B. 901; 68 L. J. Q. B. 662; 80 L. T. 757; 15 T. L. R. 331; *Clouston & Co., Ltd.* v. *Corry*, [1906] A. C. 122; 93 L. T. 706; 22 T. L. R. 107; 75 L. J. P. C. 20.

(*q*) *Harmer* v. *Cornelius*, 5 C. B. (N.S.) 236; 28 L. J. C. P. 85; 116 R. R. 654.

(*r*) *Cuckson* v. *Stones*, 1 E. & E. 248; 28 L. J. Q. B. 25; 117 R. R. 196.

(*s*) *Poussard* v. *Spiers*, 1 Q. B. D. 410; 45 L. J. Q. B. 621; 34 L. T. 572; *Warburton* v. *Co-operative Society, Ltd.*, [1917] 1 K. B., at p. 668; 86 L. J. K. B. 529; 116 L. T. 107; 33 T. L. R. 124.

(*t*) *George* v. *Davies* (*ubi supra*). Wages payable weekly, monthly, etc.,

A servant improperly dismissed without notice is entitled *at most* (i) to the wages for the period during which his notice would have run; (ii) to the profits or commission which would probably have been earned by him during that time; and (possibly) (iii) to damages in respect of the time which might reasonably elapse before he could obtain other employment. But since his action is for breach of contract, and not for a tort, he is not entitled to damages as compensation for the manner of his dismissal, or for injury to his feelings, or for the loss he may sustain because the dismissal makes it more difficult for him to obtain fresh employment (*u*); and he is not necessarily entitled to the full wages for the unexpired period of his service, for the fact that he has obtained, or could have obtained, similar employment must be taken into consideration, and " the law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place and it is the duty of the servant to use diligence to find another employment " (*x*). A domestic servant is, as a rule, entitled to one month's wages without board wages (*y*). Where, however, a domestic servant was wrongfully dismissed during the currency of a month's notice, it was held that she was entitled not only to her wages until the end of the month, but also to board wages between the date of the dismissal and the date when the notice would have terminated (*z*).

A master is not bound to give his servant a character upon dismissal (*a*); and if he does so, any statements therein are privileged, though the privilege may be lost by malice.

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accrue due at the end of each period, and a servant justifiably dismissed, or leaving in the middle of a period, loses all the wages for that period. See *Walsh* v. *Walley*, L. R. 9 Q. B., at p. 369; 43 L. J. Q. B. 102.

(*u*) *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488; 78 L. J. K. B. 1122; 101 L. T. 466. Tips which the servant would have received may be taken into account (*Manubens* v. *Leon*, [1919] 1 K. B. 208; 88 L. J. K. B. 311; 120 L. T. 279; 35 T. L. R. 94).

(*x*) *Beckham* v. *Drake*, 2 H. L. C., at p. 606; 81 R. R. 301; *Brace* v. *Calder*, [1895] 2 Q. B., at p. 259; 64 L. J. Q. B. 582; 72 L. T. 829, and see *ante*, p. 197.

(*y*) *Gordon* v. *Potter*, 1 F. & F. 644; 115 R. R. 958.

(*z*) *Lindsay* v. *Queen's Hotel Co., Ltd.*, [1919] 1 K. B. 212; 88 L. J. K. B. 535; 120 L. T. 280.

(*a*) *Carrol* v. *Bird*, 3 Esp. 201; 6 R. R. 824.

CHAPTER II.

CONTRACTS OF INDEMNITY AND SURETYSHIP. CONTRACTS OF INSURANCE.

SECTION 1.—*Contracts of Indemnity and Suretyship.*

A contract of indemnity is a contract, express or implied, " to keep a person who has entered or is about to enter into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not " (*a*). A guarantee is a promise to be answerable for the debt, default, or miscarriage of another person who is primarily liable. Instances of guarantees are promises to pay a creditor if the principal debtor makes default in payment and contracts of suretyship for a servant or agent.

Instances of express contracts of indemnity are policies of fire and marine insurance. An instance of an implied contract of indemnity is the implied contract by a principal to indemnify his agent against all losses and liabilities properly incurred by him in the execution of his agency (*b*).

An important difference between a contract of indemnity and a contract of guarantee is that the latter is within *s.* 4 of the *Statute of Frauds* (*c*). An agreement to give a guarantee is also within the statute (*d*).

To constitute a guarantee there must be:—

i. A principal contract between A and B, by which B is already, or is to become, liable to A; and

ii. A collateral contract between A and C, by which C promises A to pay the debt or discharge the obligation

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(*a*) *Guild* v. *Conrad*, [1894] 2 Q. B., at p. 896; 63 L. J. Q. B. 721; 71 L. T. 140.
(*b*) *Ante*, p. 222.
(*c*) *Ante*, p. 68.
(*d*) *Mallett* v. *Bateman*, L. R. 1 C. P. 163; 35 L. J. C. P. 40.

due from B in case of default by B, *who is to remain primarily liable* (*e*).

Thus, if C goes into a shop with B, and says to the shopkeeper A, "Supply goods to B, and, *if he does not pay you*, I will," this is a guarantee, because C.'s promise is made to a person to whom B is or will be under a legal liability; and it is collateral to the contract between A and B, and conditional upon B's failure to pay. But if C goes into a shop with B, and says to the shopkeeper, "Supply goods to B, and I will see you paid," this is a promise by C to indemnify the shopkeeper against the consequences of his contracting with B, and is not within the statute (*f*).

It must be noted that "the Statute [of Frauds] applies only to promises made *to* the person to whom another is answerable," *i.e.*, only when the promise is made to the principal *creditor*, not when it is made to the debtor (*g*). The statute further applies only when there is an "absence of any liability on the part of the defendant or his property, except such as arises from his express promise" (*h*). It does not therefore apply when the promise is merely part of, and incidental to, a main or larger contract made for some other purpose (*i*).

Thus a promise to pay the debt of another person is not within the Statute of Frauds when it is made by a person who has purchased or has an interest in goods which are subject to a lien or charge, and who obtains a discharge of the lien or charge by undertaking to be responsible for payment of the debt in respect of which it existed (*k*).

(*e*) *Goodman* v. *Chase*, 1 B. & Ald. 297; see also *Harburg Indiarubber Co.* v. *Martin*, [1902] 1 K. B., at p. 784; 71 L. J. K. B. 529; *Davys* v. *Buswell*, [1913] 2 K. B., at p. 54; 82 L. J. K. B. 499; 108 L. T. 244.

(*f*) *Birkmyr* v. *Darnell*, 2 Ld. Raym. 1085; *Lakeman* v. *Mountstephen*, L. R. 7 H. L. 17; 43 L. J. Q. B. 188.

(*g*) *Eastwood* v. *Kenyon*, 1 Ad. & E., at p. 466; 9 L. J. Q. B. 409; 52 R. R. 400.

(*h*) See *Davys* v. *Buswell*, [1913] 2 K. B., at p. 55; 82 L. J. K. B. 499.

(*i*) *Harburg Indiarubber Co.* v. *Martin*, [1902] 1 K. B., at p. 786.

(*k*) *Davys* v. *Buswell*, [1913] 2 K. B., at p. 59. For an example see *Fitzgerald* v. *Dressler*, 7 C. B. (N.S.) 374; 29 L. J. C. P. 113; 121 R. R. 543. But the mere fact that the *motive* of a person who guarantees payment of a debt due from a company is his desire to protect an interest which he has in the company through being a shareholder (*Harburg, &c., Co.* v. *Martin*, *ubi supra*), or through having a floating charge on its assets (*Davys* v. *Buswell*, *ubi supra*), will not take the case out of s. 4 of the Statute of Frauds.

Nor is such a promise within the Statute of Frauds when it is one of the terms of a contract of service, and merely regulates the conditions under which the defendant is employed. Thus the statute does not apply to a contract by a *del credere* agent, *i.e.*, an agent who guarantees his principal against any loss through the bankruptcy or insolvency of the parties with whom he contracts (*l*). A leading case illustrating this principle is that of *Sutton & Co.* v. *Gray*, in which there was a contract between a firm of brokers and the defendant, of which the terms were that he should introduce to them clients for whom they should transact business on the Stock Exchange, and that he should have half the commission earned upon, and be responsible for half the losses incurred in, such transactions. It was held that, since the main object of the agreement was to regulate the terms of the employment, the Statute of Frauds did not apply to it, although as one of its results the defendant might have to answer for the debt of another (*m*).

It has already been pointed out that, by the *Mercantile Law Amendment Act*, 1856, the consideration for a guarantee need not be expressed in writing (*n*), though, of course, as in all other contracts, there must be some consideration unless the guarantee is under seal.

Rights of Surety.—*As against his principal* the surety has a right to be indemnified not only against actual loss, but also, even before any payment by him, against any liability which has actually arisen (*o*). After payment the surety becomes a creditor of his principal for the amount paid on his behalf (*p*).

As against the creditor the surety is entitled to claim the right of *subrogation*—that is, "the right to be put in the place of the creditor as against the principal debtor, and to use all the remedy

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(*l*) *Couturier* v. *Hastie*, 8 Ex. 40; 22 L. J. Ex. 97.

(*m*) [1894] 1 Q. B. 285; 63 L. J. Q. B. 633. See also *Guild* v. *Conrad*, [1894] 2 Q. B. 885; 63 L. J. Q. B. 721; 71 L. T. 140.

(*n*) *Ante*, p. 80.

(*o*) *Lacey* v. *Hill*, L. R. 18 Eq. 182; 43 L. J. Ch. 551; 30 L. T. 484; *Hobbs* v. *Wayet*, 36 Ch. D., at p. 258; 56 L. J. Ch. 819; 57 L. T. 225. *Secus* when the liability may never come into existence (*Hughes-Hallett* v. *Indian, &c., Co.*, 22 Ch. D. 561; 52 L. J. Ch. 418; 48 L. T. 107).

(*p*) *Davies* v. *Humphreys*, 6 M. & W., at p. 157; 9 L. J. Ex. 263; 55 R. R. 547.

which the creditor could have used as against the principal debtor" (*q*). By s. 5 of the *Mercantile Law Amendment Act*, 1856, a surety is entitled to have assigned to him or to a trustee for him every judgment or other security held by the creditor, notwithstanding that it may be deemed at law satisfied by his payment or performance, and is entitled to stand in the place of the creditor and to use all the remedies open to the creditor in order to obtain indemnity from the principal debtor *or from any co-surety*. This section applies to all securities received by the creditor before or after the date of the guarantee, even though the surety was unaware of their existence (*r*).

As against his co-sureties the surety has the right to *contribution*; that is to say, if any of several co-sureties is called upon to pay the debt or any part of it, he has a right to call upon his *solvent* co-sureties to contribute equally if each is a surety to an equal amount, and, if not equally, then proportionately to the amount for which each is a surety (*s*). To give a co-surety this right to contribution, it is not necessary that he should have actually paid more than his share; it is sufficient if a judgment for more than his share has been obtained against him (*t*). For the purposes of obtaining contribution he has, as stated in the last paragraph, a right to the assignment of any securities held by the creditor. But the right of a co-surety who has satisfied a judgment obtained by the creditor against the debtor and his sureties to stand in the place of the judgment creditor may be enforced, although he has not obtained an actual assignment of the judgment (*u*).

Rescission of Contract. Discharge of Surety.—A contract of suretyship may, like any other contract, be *voidable* on the ground

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(*q*) *Darrell* v. *Tibbitts*, 5 Q. B. D., at p. 563; 50 L. J. Q. B. 33; 42 L. T. 797.

(*r*) *Forbes* v. *Jackson*, 19 Ch. D. 615; 51 L. J. Ch. 690; *Ward* v. *Nat. Bank of New Zealand*, 8 A. C., at p. 765; 52 L. J. P. C. 65; and see *Duncan, Fox & Co.* v. *North and South Wales Bank*, 6 A. C. 1; 50 L. J. Ch. 335.

(*s*) *Dering* v. *Earl of Winchelsea*, 2 W. & T. 539; 1 R. R. 41; see *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514; 62 L. J. Ch. 773; 68 L. T. 753; and *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173 (where the doctrine of contribution and its application are explained and the authorities are reviewed). See also Wilshere's Equity, chapter ix., s. 2.

(*t*) *Wolmershausen* v. *Gullick* (*ubi supra*).

(*u*) *Re M'Myn, Lightbound* v. *M'Myn*, 33 Ch. D. 575; 55 L. J. Ch. 845.

of misrepresentation (*x*), and also in some cases on the ground of non-disclosure. Contracts of suretyship are not ordinarily *uberrimæ fidei* in the sense that there is an obligation to make full disclosure of all material facts. "Whether the contract be one requiring *uberrima fides* or not must depend upon its substantial character and how it came to be effected" (*y*). But concealment of a fact which a surety would expect not to exist, and the existence of which is inconsistent with the presumed basis of the contract, may amount to an implied representation that the fact does not exist, as *e.g.*, concealment from a surety for the honesty of a servant of his previous dishonesty (*z*).

A surety may be *discharged*:—

1. By the extinction of the principal contract, as, *e.g.*, by the release of the principal debtor (*a*). But by the *Bankruptcy Act*, 1914, an order of discharge in bankruptcy does not release a surety for the bankrupt (*b*), nor does the acceptance by a creditor of a composition or scheme of arrangement release a surety for the debtor (*c*).

But a surety is not discharged if the creditor merely covenants not to sue the principal debtor, but expressly reserves his rights against the surety (*d*); and the discharge of the surety may also be prevented by an express provision in the contract of suretyship that the surety shall continue liable notwithstanding the release of the principal debtor (*e*).

(*x*) *Ante*, p. 89.

(*y*) *Seaton* v. *Heath*, [1899] 1 Q. B., at p. 792; 68 L. J. Q. B. 631; 80 L. T. 579; 15 T. L. R. 297; and see *Railton* v. *Matthews*, 10 Cl. & Fin. 934; 59 R. R. 308; *Lee* v. *Jones*, 17 C. B. (N.S.) 482; 34 L. J. C. P. 131; 142 R. R. 467; *Davies* v. *London, etc., Marine Insurance Co.*, 8 Ch. D., at p. 475; 47 L. J. Ch. 511; 38 L. T. 478.

(*z*) *London General Omnibus Co.* v. *Holloway*, [1912] 2 K. B. 72; 81 L. J. K. B. 603. But in the case of a guarantee given to a bank for an overdraft of a customer the bank is not bound to disclose to the guarantor facts from which it has suspicions that the customer is defrauding the guarantor (*National Provincial Bank* v. *Glanusk*, [1913] 3 K. B. 335; 82 L. J. K. B. 1033).

(*a*) *Commercial Bank of Tasmania* v. *Jones*, [1893] A. C. 313; 68 L. T. 776; 62 L. J. P. C. 104.

(*b*) S. 28 (4).

(*c*) S. 16 (20). A payment made by the debtor to the creditor, which is afterwards set aside as a fraudulent preference in the debtor's bankruptcy, does not discharge the surety (*Petty* v. *Cooke*, L. R. 6 Q. B. 790; 40 L. J. Q. B. 281).

(*d*) *Price* v. *Barker*, 4 E. & B. 760; 24 L. J. Q. B. 130; 99 R. R. 734.

(*e*) *Perry* v. *National Provincial Bank of England*, [1910] 1 Ch. 464; 79 L. J. Ch. 509; 102 L. T. 300.

2. By any transaction which varies the position or liability of the surety *without his consent* (*f*), as, *e.g.*:—

i. When co-sureties agree to become sureties jointly and severally, and one of them fails to execute the agreement of suretyship or is released by the principal creditor (*g*); but a surety who contracts only severally is not released by the release of a co-surety, or his failure to execute the agreement (*h*).

ii. When the creditor fails to perform a condition in consideration of which the surety entered into the contract of suretyship (*i*).

iii. By alteration of the instrument of suretyship by a co-surety who is jointly and severally liable (*k*).

iv. By any alteration in the terms of the contract between the creditor and the principal debtor, unless such alteration is clearly unsubstantial or one which cannot be prejudicial to the surety (*l*). But if the creditor enters into a contract with the principal debtor to give him time, this is an alteration which is always material, because it deprives the surety of the right which he has to pay off at once the debt which he has guaranteed and to sue the principal debtor. Such an agreement, therefore, always discharges the surety, unless the creditor in making it expressly reserves his rights against the surety (*m*). But a mere forbearance to sue the principal debtor will not discharge the surety (*n*). There must be a binding contract, capable

(*f*) See *Newton* v. *Chorlton*, 2 Drew., at p. 339; 90 R. R. 501; *Rees* v. *Berrington*, 6 Ves. jun. 540; 3 R. R. 3; *Polak* v. *Everett*, 1 Q. B. D. 669; 46 L. J. Q. B. 218; 35 L. T. 350.

(*g*) *Bonser* v. *Cox*, 6 Beav. 110; *Evans* v. *Bembridge*, 25 L. J. Ch. 334; 49 L. T. 315; *Ellesmere Brewery Co.* v. *Cooper* (*ubi supra*).

(*h*) *Ward* v. *Nat. Bank of New Zealand*, 8 A. C. 755; 52 L. J. P. C. 65.

(*i*) *Lawrence* v. *Walmsley*, 31 L. J. C. P. 143; 5 L. T. 798.

(*k*) *Ellesmere Brewery Co.* v. *Cooper* (*ubi supra*).

(*l*) *Holme* v. *Brunskill*, 3 Q. B. D. 495; 47 L. J. Q. B. 610; see also *Croydon Gas Co.* v. *Dickinson*, 2 C. P. D. 46; 46 L. J. C. P. 76; *Egbert* v. *National, etc., Bank*, [1918] A. C. 903; 87 L. J. P. C. 188; 119 L. T. 659; 35 T. L. R. 1.

(*m*) *Id.*; and see *Owen* v. *Homan*, 4 H. L. 997; 20 L. J. Ch. 314; 94 R. R. 516; *Strong* v. *Foster*, 25 L. J. C. P. 106; *Boaler* v. *Mayor*, 19 C. B. (N.S.) 76; 34 L. J. C. P. 230; 147 R. R. 517; *Norman* v. *Bolt*, 1 C. & E. 77; *Goldfarb* v. *Bartlett & Kremer*, [1920] 1 K. B. 639; 89 L. J. K. B. 258; 122 L. T. 588.

(*n*) *Strong* v. *Foster* (*ubi supra*); and see *Rouse* v. *Bradford Banking Co.*, [1894] A. C. 586; 63 L. J. Ch. 890; 71 L. T. 522.

of being enforced; and it must be made with the principal debtor, and not with a third party (*o*).

v. By the *connivance of the creditor* in any act contrary to the conditions of the guarantee which is likely to lead to default on the part of the principal debtor, though not by mere carelessness of the creditor (*p*).

vi. By any act or omission on the part of the creditor which is injurious to the surety or inconsistent with his rights (*q*), as, for example, if a servant whose honesty is guaranteed is retained in his employment after acts of dishonesty justifying dismissal (*r*), or if the creditor gives up or impairs a security upon the benefit of which a surety is entitled to rely (*s*).

Revocation of a continuing guarantee.—A continuing guarantee which is given for a consideration provided from time to time, and divisible, *e.g.*, for the balance of a running account at a bank or for goods to be supplied, may always be revoked as to future transactions or debts so as to discharge the surety from further liability (*t*). Such a guarantee is not revoked simply by the death of the guarantor, but notice of the death of the guarantor given to the creditor is constructive revocation as to future advances (*u*), unless the contract stipulates that some particular notice of revocation shall be necessary in order to terminate the guarantee (*x*). But a continuing guarantee, when

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(*o*) *Clarke* v. *Birley*, 41 Ch. D. 422; 58 L. J. Ch. 616; 60 L. T. 948.

(*p*) *Mayor, etc., of Durham* v. *Fowler*, 22 Q. B. D., at p. 420; 58 L. J. Q. B. 246; 60 L. T. 456.

(*q*) *Watts* v. *Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 229. Affirmed, 7 H. & N. 353; 5 L. T. 58.

(*r*) *Phillips* v. *Foxall*, L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*s*) *Campbell* v. *Rothwell*, 47 L. J. Q. B. 114; 38 L. T. 33; and see *Taylor* v. *Bank of New South Wales*, 11 A. C., at p. 603; 55 L. J. P. C. 47; 55 L. T. 444.

(*t*) *Offord* v. *Davies*, 12 C. B. (N.S.) 748; 31 L. J. C. P. 319; 133 R. R. 491; *Re Crace*, *Balfour* v. *Crace*, [1902] 1 Ch. 733; 71 L. J. Ch. 358; 86 L. T. 144. Whether or not a guarantee is a continuing one is a question of construction. See *Allnutt* v *Ashenden*, 5 M. & G. 392; 12 L. J. C. P. 124; *Ellis* v. *Emanuel*, 1 Ex. D. 157; 46 L. J. Ex. 25; 34 L. T. 553; *Heffield* v. *Meadows*, L. R. 4 C. P. 596; 20 L. T. 746; *Coles* v. *Pack*, L. R. 5 C. P. 65; 39 L. J. C. P. 63.

(*u*) *Coulthart* v. *Clementson*, 5 Q. B. D. 42; 49 L. J. Q. B. 204.

(*x*) *Re Silvester, Midland Railway Co.* v. *Silvester*, [1895] 1 Ch. 573; 64 L. J. Ch. 390; 72 L. T. 283. In this case the contract provided that the sureties or their representatives might terminate their liability by a month's

the consideration is given once for all, *e.g.*, for admission at Lloyd's, or for granting a lease, or for the honesty of a servant, cannot be revoked unless there is an express stipulation to that effect; nor is it determined by the death of the guarantor, nor by the fact that his death has come to the knowledge of the person to whom the guarantee is given (*y*).

By s. 18 of the *Partnership Act*, 1890, a continuing guarantee, given either to a firm or to a third person in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, it was given.

Section 2.—*Contracts of Insurance.*

Insurance is a contract by which, in consideration of a sum of money called the premium, the insurer contracts with the assured either to pay a specified sum on the happening of a particular event, such as the death of a particular person or injury by accident, or to indemnify, usually up to a specified amount, against a loss caused by some particular risk such as fire, burglary or marine adventure.

A contract of insurance is usually entered into upon the basis of a proposal signed by the person intending to be assured, and consisting chiefly of his answers to certain questions therein, which are to be the basis of the policy (*z*). All contracts of insurance are contracts *uberrimæ fidei*, and may therefore be avoided not only on the ground of fraudulent or material misrepresentation (*a*), but also if the assured conceals or fails to disclose any fact within his knowledge which it is material for the insurer to know (*b*). It may also be made an express condition of the con-

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notice in writing. Held, that a mere notice of the *death* of a surety by his executor was insufficient.

(*y*) *Re Crace, Balfour* v. *Crace* (*ubi supra*); *Lloyd's* v. *Harper*, 16 Ch. D. 290; 50 L. J. Ch. 140.

(*z*) See *Glicksman* v. *Lancashire and General Assurance Co., Ltd.*, [1925] 2 K. B., at p. 611.

(*a*) See *ante*, p. 89.

(*b*) *Lindenau* v. *Desborough*, 8 B. & C. 586; 7 L. J. K. B. 42; *London Assurance* v. *Mansel*, 11 Ch. D., at p. 367; 48 L. J. Ch. 331; *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.*, [1925] A. C. 344; 94 L. J. P. C. 60; 132 L. T. 652; 41 T. L. R. 183. As to marine insurance, see also the Marine Insurance Act, 1906, s. 18.

tract that the truth of some particular statement, or the existence of some particular thing, or performance of some particular act, shall be the basis of the contract, so that no question of its materiality can arise, and in case of its untruth or non-existence the contract will be absolutely null and void (*c*). But even in such a case the acceptance by the insurer of premiums after knowledge of the true facts may amount to a waiver of a breach of condition (*d*). And knowledge by an agent of the insured is as a general rule equivalent to knowledge by the insurer (*e*).

Any material representation made by the assured must be true, not merely when it is made, but when the *contract* is concluded. Thus A, in his proposal, made certain statements as to his health, and a declaration that they were true and were to be taken as the basis of the contract. The proposal said nothing about the premium. The insurers wrote accepting his offer, *subject to payment of a certain premium*, their letter thus being not a binding acceptance, but a mere offer. A, having subsequently to his proposal suffered an accident which materially altered the state of his health, tendered to the company the premium, which they refused. It was held (i) that there was no contract before the tender of the premium, and (ii) that since the risk was changed the insurers' offer could not be regarded as a continuing offer which A was entitled to accept (*f*). So also

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(*c*) See *Thomson* v. *Weems*, 9 A. C. 671; *Hambrough* v. *Mutual Life Insurance Co. of New York*, 72 L. T. 140; *Ellinger* v. *Mutual, etc., of New York* (*post*, p. 293, note (*u*)); *Yorke* v. *Yorkshire Insurance Co.*, [1918] 1 K. B. 662; 87 L. J. K. B. 881; 34 T. L. R. 353; *Dawson's, Ltd.* v. *Bonnin*, [1922] 2 A. C. 413; 91 L. J. P. C. 210; 38 T. L. R. 836; *Glicksman* v. *Lancashire, etc., Assurance Co.*, [1927] A. C., at p. 143. Insurance policies frequently contain provisions, usually termed conditions, as to the doing of some act by the insured, as, *e.g.*, that he shall give notice of an accident within a certain time. The failure to perform such a "condition" does not, however, prevent the insured from recovering, unless it is a condition of the contract or its performance is expressly made a condition precedent to his right to recover (*Stoneham* v. *Ocean, etc., Accident Insurance Co.*, 19 Q. B. D. 237; 57 L. T. 236; 3 T. L. R. 695).

(*d*) See *Ayrey* v. *British Legal and United Provident Assurance Co.*, [1918] 1 K. B. 136; 87 L. J. K. B. 513; 118 L. T. 255; 34 T. L. R. 111.

(*e*) *Id.*; and see *ante*, p. 234. This principle was, however, held not to apply where an agent of the insured, in filling up a proposal form with answers which he knew to be incorrect, was acting as agent for the *applicant* (*Biggar* v. *Rock Life Insurance Co.*, [1902] 1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636).

(*f*) *Canning* v. *Farquhar*, 16 Q. B. D. 727; 55 L. J. Q. B. 225.

the renewal of a policy is impliedly made on the basis that the statements in the original proposal are still true (*g*).

All ordinary contracts of insurance (except life insurance and insurance against personal injury) and of re-insurance are contracts of *indemnity*, which means " that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified, and anything which diminishes that loss diminishes the amount which the insurer is liable to pay " (*h*).

It is essential to every contract of insurance that it should not be a mere contract of gaming or wagering, and that the assured should have an *insurable interest* in the subject-matter of the contract. This, as regards marine insurance, is enacted by *s.* 4 of the *Marine Insurance Act*, 1906, and, as regards all other contracts of insurance, by the *Gambling Act*, 1774, which (i) prohibits and makes void the making of any insurance on the life of any person or on any event whatsoever wherein the person for whose benefit or on whose account the policy is made has no interest; or by way of gaming and wagering; and (ii) requires that in every policy the name of the person shall be inserted for whose benefit or on whose account it is made; and (iii) provides that no greater sum shall be recovered from the insurer than the amount or value of the interest of the assured (*i*). This Act does not, however, apply to insurances on ships, goods and merchandise (*k*).

Generally speaking a person has an insurable interest whenever he has some legal or equitable relation to or concern or interest in the subject of the insurance, which relation, concern or interest may, by the happening of the risk insured against, be so affected as to produce a damage, detriment or prejudice to the person insuring (*l*). It is not, necessary, however, that a

(*g*) *Re Wilson and Scottish Insurance Corporation*, [1920] 2 Ch. 28; 89 L. J. Ch. 329; 123 L. T. 404; 36 T. L. R. 545.

(*h*) *Castellain* v. *Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; *British Dominions Insurance Co., Ltd.* v. *Duder*, [1915] 2 K. B. 394; 84 L. J. K. B. 1625; 113 L. T. 407; 31 T. L. R. 374.

(*i*) *Id.*, ss. 1, 2, 3. With certain exceptions in the case of life insurance, the interest must, therefore, be a pecuniary interest (see *Griffiths* v. *Fleming*, [1909] 1 K. B., at p. 814; 78 L. J. K. B. 567).

(*k*) S. 4. See also *Williams* v. *Baltic Insurance Association*, [1924] 2 K. B. 282; 93 L. J. K. B. 819; 131 L. T. 671; 40 T. L. R. 668.

(*l*) *Lucena* v. *Crawfurd*, 2 Bos. & P. N. R. 269; 6 R. R. 623; *Moran*,

person insuring property should have a right arising out of ownership (*m*), it is sufficient if he is legally responsible to some other person in respect of the property insured (*n*). Accordingly a bailee who is responsible to his bailor for goods entrusted to him has an insurable interest in such goods to their full value and can recover the full value from the insurer, but, after satisfying his own claim he is trustee of the balance for the bailor (*o*).

It is not necessary that a contract of insurance should be in writing, but a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy, and in the case of other contracts of insurance a stamped policy must be issued within a month after the receipt of the premium (*p*).

Another characteristic of such contracts of insurance as are contracts of indemnity is the insurer's right of *subrogation*; that is to say, his right, when the assured has a remedy against a third person to compel him ultimately to make good the loss, to be put, like a surety, in the place of the assured, and to have all the remedies of the assured against the third person who is ultimately liable (*q*). Thus an insurance may be effected against almost any loss or contingency, but the most important kinds are marine, fire, life and accident insurance.

Marine Insurance.—The law on this subject is now governed by the *Marine Insurance Act*, 1906 (*r*).

The contract.—A contract of marine insurance is one whereby the insurer undertakes to *indemnify* the assured against losses incident to marine adventure (*s*).

Galloway & Co. v. *Uzielli*, [1905] 2 K. B., at p. 562; 74 L. J. K. B. 494; 21 T. L. R. 378; *Macaura* v. *Northern Insurance Co.*, [1925] A. C. 619; 94 L. J. P. C. 154; 133 L. T. 152; 41 T. L. R. 447.

(*m*) *Moran, Galloway & Co.* v. *Uzielli* (*ubi supra*).

(*n*) *Marks* v. *Hamilton*, 7 Ex. 323; 21 L. J. Ex. 169; 86 R. R. 667; *Stock* v. *Inglis*, 12 Q. B. D. 564; affirmed *sub nom. Inglis* v. *Stock*, 10 A. C. 263; 54 L. J. Q. B. 582; 52 L. T. 821.

(*o*) *Waters* v. *Monarch Life Assurance Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102; 103 R. R. 786; *L. & N. W. Ry. Co.* v. *Glyn*, 1 E. & E. 652; 28 L. J. Q. B. 188.

(*p*) Stamp Act, 1891, ss. 98—100.

(*q*) *Castellain* v. *Preston* (*ubi supra*); *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226; 66 L. J. Q. B. 36; 75 L. T. 564.

(*r*) 6 Edw. 7, c. 41. The remaining references in this section are to this Act. The First Schedule to the Act contains a form of policy and rules for its construction.

(*s*) S. 1.

There is a marine adventure when any ship, goods, or other moveables are exposed to maritime perils or the earning or acquisition of any freight, passage money, profit or other pecuniary benefit is endangered by the exposure of insurable property to maritime perils, *i.e.*, perils consequent on, or incidental to, the navigation of the sea (*t*).

Every contract of marine insurance by way of gaming and wagering is void: it is deemed to be a gaming or wagering contract if the assured has not an insurable interest and the contract is entered into with no expectation of acquiring such an interest (*u*).

Every person who is interested in a marine adventure has an insurable interest (*x*). Thus shipowners have an insurable interest in the ship and freight (*y*), the owner of goods or the person at whose risk they are carried has an insurable risk in them (*z*), and the lender of money on bottomry or respondentia has an interest in respect of the loan (*a*). The assured must be interested in the subject-matter insured at the time of the loss, though he need not be interested when the insurance is effected (*b*).

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party" (*c*). "The assured must disclose to the insurer, before the contract is concluded" (*i.e.*, as soon as his proposal is accepted, whether the policy be then issued or not) (*d*), "every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the

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(*t*) S. 3.

(*u*) S. 4. No right of subrogation can therefore arise from such a contract (*Edwards & Co.* v. *Motor Insurance Co.*, [1922] 2 K. B. 249; 91 L. J. K. B. 921; 38 T. L. R. 690). By the Marine Insurance (Gambling Policies) Act, 1909, gambling on loss by maritime perils is an offence punishable by fine and imprisonment.

(*x*) S. 5 (1).

(*y*) See *Camden* v. *Anderson*, 5 T. R. 709; 35 L. J. C. P. 172.

(*z*) See *Seagrave* v. *Union Marine Insurance Co.*, L. R. 1 C. P. 305.

(*a*) S. 10. See *post*, Part II., Chapter IV.

(*b*) S. 6 (1).

(*c*) S. 17.

(*d*) S. 21.

ordinary course of business, ought to be known by him" (*e*), but the assured, in the absence of inquiry, need not disclose any circumstance as to which information is waived by the insurer or which is known or presumed to be known to the insurer, *e.g.*, matters of common knowledge or which the insurer in the ordinary course of business ought to know (*f*).

Every material representation, whether as to fact, expectation or belief, made by the assured or his agent during the negotiations for the contract must be true, or the insurer may avoid the contract. A representation is material if it would influence the judgment of a prudent insurer in fixing the premium or accepting the risk (*g*).

The policy.—A contract of marine insurance is inadmissible in evidence unless embodied in a marine policy in accordance with the Act, but the policy may be executed and issued after the contract is concluded (*h*).

The policy must specify " (i) the name of the assured or of some person who effects the insurance on his behalf; (ii) the subject-matter insured and the risk insured against; (iii) the voyage or period of time, or both, as the case may be, covered by the insurance; (iv) the sum or sums insured; (v) the name or names of the insurers" (*i*). It must be signed by or on behalf of the insurers; in case of a corporation, the corporate seal is *sufficient*, but the subscription of a corporation is not *required* to be under seal (*k*). The policy may be either a *voyage policy*, *i.e.*, a contract to insure the subject-matter at and from, or from one place to another, or a *time policy*, *i.e.*, a contract to insure the subject-matter for a definite period of time (*l*). A time policy is void if it is made for a period of more than twelve months (*m*), but it is not void merely because it contains a " continuation clause," by reason of which it may become available for a period exceeding twelve months (*n*).

(*e*) S. 18 (1). By s. 19 an agent who effects an insurance must also disclose every material circumstance which he knows or ought to know.
(*f*) S. 18 (3).
(*g*) S. 20. See *Greenhill* v. *Federal Insurance Co., Ltd.*, [1927] 1 K. B. 65.
(*h*) S. 22. (*i*) S. 23.
(*k*) S. 24. (*l*) S. 25 (1).
(*m*) S. 25, (2).
(*n*) Finance Act, 1901, s. 11, *e.g.*, an agreement that, if the ship is at sea on the expiration of the policy, the insurance shall hold good until its arrival.

A policy may be either a *valued* or an *unvalued* policy: the former specifies the agreed value of the subject-matter insured and is conclusive between insurer and assured as to its insurable value; the latter does not specify its value, but, subject to the limit of the sum insured, leaves it to be ascertained as provided for by the Act (*o*).

Warranties.—A warranty, in the sections of the Act relating to warranties (*p*), means a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts (*q*). Such a warranty is a *condition* which must be exactly complied with, whether material to the risk or not; otherwise, subject to any provision in the policy the insurer is discharged from liability as from the date of the breach of warranty (*r*). A warranty may be express or implied (*s*); but an express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy (*t*).

The voyage.—Where the subject-matter is insured by a voyage policy "at and from" or "from" a particular place there is an implied *condition* that the adventure shall be commenced within a reasonable time; otherwise the insurer may avoid the contract, unless the delay was caused by circumstances known to him when the contract was concluded or he has waived the condition (*u*). If the ship sails from any port of departure or to any destination other than that specified in the policy the risk does not attach (*x*). If after the commencement of the risk there is a change of voyage or deviation from the voyage contemplated by the policy, or any unreasonable delay in prosecuting the voyage, the insurer is discharged as from the time of change or deviation or the time when the delay became unreasonable (*y*). Deviation or delay

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(*o*) Ss. 27 and 28, and (as to ascertainment of insurable value) s. 16.
(*p*) Ss. 33—41.
(*q*) S. 33 (1).
(*r*) S. 33 (3).
(*s*) S. 33 (2).
(*t*) S. 35 (2). Certain warranties are implied by ss. 39—41, *e.g.*, that the adventure is a lawful one, and, in a voyage policy, that the ship shall be seaworthy at the commencement of the voyage.
(*u*) S. 42.
(*x*) Ss. 43, 44
(*y*) Ss. 45—48.

may, however, be excused in certain cases, as, *e.g*, where caused by circumstances beyond the control of the master or his employer, or where reasonably necessary for the safety of the subject-matter insured, or for the purpose of saving human life (*z*).

Assignment of policy.—A marine policy is assignable unless it contains terms expressly prohibiting assignment, and may be assigned either before or after loss. The assignee may sue in his own name, and the defendant may set up any defence which he could have set up if the action had been brought in the name of the person by or on behalf of whom the policy was effected. The assignment may be by indorsement thereon, or in other customary manner (*a*). If an assured has parted with or lost his interest in the subject-matter insured, and has not before or at the time of so doing agreed to assign the policy, any subsequent assignment of the policy is inoperative (*b*).

Liability of insurer.—The insurer is liable for any loss proximately caused by a peril insured against (*c*). A loss may be total or partial (*d*). There is an *actual total loss* where the subject-matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof (*e*). There is a *constructive* total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value after the expenditure had been incurred (*f*). Where there is a constructive total loss the assured may either treat the loss as a partial loss or abandon the subject-matter to the insurer and treat the loss as an actual total loss, in which case he must give notice of abandonment to the insurer, who is then entitled to take over the interest and proprietary rights of the assured in whatever remains of the subject-matter (*g*).

Partial losses include (i) general average losses; (ii) particular average losses and particular charges; (iii) salvage charges.

(*z*) S. 49.
(*b*) S. 51.
(*d*) S. 56.
(*f*) S. 60.
(*a*) S. 50.
(*c*) S. 55.
(*e*) S. 57 (1).
(*g*) Ss. 61—63.

In every sea voyage there is an adventure common to several parties with different interests, *i.e.*, the owners of the ship, the owners of the cargo, and the persons entitled to freight. In some cases it is necessary, in the interest of all parties, to sacrifice some particular part of the property at risk, as, *e.g.*, by the jettison of cargo, or by the cutting away of masts or tackle, or to incur some expenditure as a consequence of such sacrifice. A *general average loss* is a loss which is caused by or consequential upon any such extraordinary sacrifice or expenditure which is "voluntarily and reasonably incurred in time of peril for the purpose of preserving the property imperilled in the common adventure" (*h*). A general average loss must be shared by all persons whose interests were at risk, and for that purpose the party on whom it falls is entitled to a rateable contribution from the other parties interested, termed a "general average contribution" (*i*). A "*particular average loss* is any partial loss of the subject-matter insured, caused by a peril insured against, which is not a general average loss" (*k*). Such a loss must be borne by the party on whom it falls. *Particular charges* are "expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured other than general average and salvage charges" (*l*). *Salvage* is the reward payable for services rendered to a vessel in distress (*m*). The essentials of a salvage service are (i) danger to the subject of the service (*n*); (ii) the service must be voluntary (*o*); and (iii) the service must be successful, or must at least contribute to the ultimate safety of its subject (*p*). The only subjects in respect of the saving of

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(*h*) S. 66 (1) (2). The peril must really exist; it is insufficient that there was a *bona fide* belief in its existence (*Watson & Sons, Ltd.* v. *Firemen's, etc., Insurance Co.*, [1922] 2 K. B. 355; 92 L. J. K. B. 31; 127 L. T. 754; 38 T. L. R. 752).

(*i*) S. 66 (3).

(*k*) S. 64 (1).

(*l*) S. 64 (2).

(*m*) For various definitions see *The Gas Float Whitton* (*No.* 2), [1896] P. 42; 65 L. J. Adm. 17; 73 L. T. 698; and for a discussion of the principles governing general average, see *Svendsen* v. *Wallace*, 13 Q. B. D. 69; 53 L. J. Q. B. 815.

(*n*) *The Strathnaver*, 1 A. C. 58; 34 L. T. 148; *The Aglaia*, 13 P. D. 160; 57 L. J. Adm. 106; 59 L. T. 528.

(*o*) *Cargo ex Schiller*, 46 L. J. Adm. 9; 2 P. D., at p. 149; 36 L. T. 714.

(*p*) *The Camelia*, 9 P. D. 27; 53 L. J. Adm. 12; 50 L. T. 126; but see *The Killeena*, 6 P. D., at p. 198; 45 L. T. 621; 51 L. J. Adm. 11.

which salvage reward could be claimed at Common Law were a ship, or part of a ship, or her apparel or cargo, or the wreck of them, or freight (*q*); but by the *Merchant Shipping Act*, 1894 (*r*), life salvage has been added. Since the service must be voluntary, the officers of a ship cannot claim salvage from her unless their contract of service is dissolved, as, *e.g.*, by the *bona fide* abandonment of the ship (*s*). Nor, as a rule, are passengers entitled to salvage reward (*t*). A pilot is not entitled to salvage reward if he merely performs pilotage services. In order to recover salvage reward he must show that the ship was in such distress as to be in danger of being lost, and to call upon him to perform services so unusual as to make it unfair that he should be paid otherwise than upon the terms of salvage reward (*u*). Services rendered by ships of His Majesty's Navy could not formerly found a claim for salvage reward, but this disability has been removed by the *Merchant Shipping (Salvage) Act*, 1916 (*x*).

Measure of indemnity.—In case of a *total loss* the measure of indemnity is (i) if the policy be a valued policy, the sum fixed by the policy; (ii) if the policy be an unvalued policy, the insurable value of the subject-matter (*y*). In case of a *partial loss* the indemnity is fixed by rules laid down by the Act (*z*).

Rights of Insurer on Payment.

Subrogation.—Where the insurer pays for a total loss he is entitled to take over the interest of the assured in whatever remains of the subject-matter, and is thereby subrogated to all the rights and remedies of the assured in respect of the subject-matter as from the time of the casualty causing the loss. Where he pays for a partial loss he acquires no title to any part of

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(*q*) *The Gas Float Whitton* (*No.* 2), [1896] P., at p. 63; 66 L. J. Adm. 99.
(*r*) 57 & 58 Vict. c. 60, s. 544.
(*s*) *The Florence*, 16 Jur. 572; and see s. 65 (2).
(*t*) *The Vrede*, 30 L. J. Adm. 209. But in exceptional circumstances they may be entitled to it (see *Newman* v. *Walters*, 3 Bos. & P. 662; 7 R. R. 886).
(*u*) *Akerblom* v. *Price*, 7 Q. B. D., at p. 135; 50 L. J. Q. B. 269.
(*x*) 6 & 7 Geo. 5, c. 41.
(*y*) S. 68.
(*z*) Ss. 69—75.

the subject-matter, but is similarly subrogated to all the rights and remedies of the assured in so far as the assured has been indemnified by such payment (*a*).

Contribution.—Where the assured is over-insured by double insurance each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract. If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and has the same remedies as a surety who has paid more than his proportion of the debt (*b*).

Fire Insurance.—A contract of fire insurance is also simply a contract of indemnity, being only a contract by which, in consideration of the payment of a premium, the insurer undertakes to make good to the assured any loss which may happen from fire.

The amount payable is merely such a sum, not being in excess of the sum insured for, as will indemnify the assured against the loss which he has actually suffered. Thus, in the case of *Darrell* v. *Tibbetts*, a landlord had insured his house against damage by fire, including gas explosions; his tenants, by the terms of their lease, were also bound to make good any such damage. An explosion having occurred by the act of a third party, the landlord received payment from the insurance company. The tenants subsequently obtained compensation from the third party, and made good the damage. It was accordingly held that the landlord was bound to repay the insurance company, "otherwise he would be not merely indemnified; he would be paid twice over." If, however, the tenants had not made good the damage, and had refused to do so, the insurers, by virtue of their right of subrogation, might have sued them in the name of the landlord (*c*).

A contract of fire insurance is a mere personal contract, and, unless it is assigned, no action can be maintained upon it except between the original parties to it (*d*). Nor without express assignment does it pass to the purchaser under a contract for

(*a*) S. 79.
(*b*) S. 80.
(*c*) 5 Q. B. D. 560; 50 L. J. Q. B. 33; 42 L. T. 797.
(*d*) *Rayner* v. *Preston*, 18 Ch. D., at p. 11; 50 L. J. Ch. 472; 44 L. T. 787.

sale of the property insured. Thus A, having previously insured a house, contracted to sell it to B, the contract containing no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire and A was paid by the insurance company. It was held that the purchaser, who had subsequently completed his contract, was not entitled as against the vendor to the benefit of the insurance (*e*).

Now, however, by s. 47 of the *Law of Property Act*, 1925, where, after the date of any contract made after 1925 for the sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to, or destruction of, property included in the contract, the money shall (subject (i) to any contrary stipulation contained in the contract, and (ii) to any requisite consents of the insurers, and (iii) the payment by the purchaser of the proportionate part of the premium from the date of the contract) be held or receivable by the vendor on behalf of the purchaser, and paid to him on completion of the sale or exchange or so soon thereafter as it is received by the vendor.

A contract of fire insurance cannot be assigned without the consent of the insurer (*f*). By the Metropolitan Building Act, 1774 (*g*), in case of a house or other building, any person interested may require the insurance money to be laid out in repairs or rebuilding.

Life Insurance.—A contract of life insurance is not, however, a contract of indemnity, but a contract to pay a fixed sum on the death of a person in consideration of the immediate payment

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(*e*) *Id.* The vendor in such a case has, so long as he is unpaid by the purchaser, the right to recover from the insurance company (*Collingridge* v. *Royal Exchange Association*, 3 Q. B. D. 173; 47 L. J. Q. B. 32; 37 L. T. 525); but if, after payment by the insurance company, he receives the purchase money, he must, out of it, repay the insurance company (*Castellain* v. *Preston*, 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; see also *Phœnix Assurance Co.* v. *Spooner*, [1905] 2 K. B. 753; 74 L. J. K. B. 792; 93 L. T. 306; 21 T. L. R. 577.

(*f*) *Saddlers' Co.* v. *Badcock*, 2 Atk. 554.

(*g*) 14 Geo. 3, c. 78, s. 83. This Act has been held not to be limited to the Metropolitan area, but to be of general application (*Sinnott* v. *Bowden*, [1912] 2 Ch. 414; 28 T. L. R. 594, following earlier decisions to the same effect).

of a smaller sum or of periodical payment of certain premiums during his life.

The Gambling Act, 1774, does not prevent a person from insuring his own life for any amount (*h*), or a husband from insuring the life of his wife (*i*), or a wife from insuring the life of her husband (*k*). And by s. 11 of the *Married Women's Property Act*, 1882, it is provided (i) that a married woman may effect a policy upon her own life or the life of her husband for her separate use; and (ii) that a policy effected by any man on his own life and expressed to be for the benefit of his wife or children, or any of them, or a policy effected by a woman on her own life and expressed to be for the benefit of her husband or children, or any of them, shall create a trust in favour of the persons for whose benefit it is effected, and that the money payable under any such policy shall not form part of the estate of the insured or be liable to his or her debts; provided that, if the policy was effected and the premiums were paid with intent to defeat the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid.

But a parent cannot insure the life of his child unless he has some pecuniary interest therein (*l*); nor has a child, merely by virtue of relationship, an insurable interest in the life of his or her parent (*m*); nor have sisters, as such, an insurable interest in each other's lives (*n*).

A creditor has an insurable interest in the life of his debtor

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(*h*) *Wainwright* v. *Bland*, 1 Moo. & R. 481; 5 L. J. Ex. 147; see also *Griffiths* v. *Fleming* (*infra*).

(*i*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805; 78 L. J. K. B. 567; 100 L. T. 765; 25 T. L. R. 377.

(*k*) *Reed* v. *Royal Exchange Assurance Co.*, Peake Add. Cas 70; see also *Griffiths* v. *Fleming* (*supra*).

(*l*) *Halford* v. *Kymer*, 10 B. & C. 724; 8 L. J. K. B. 311; 34 R. R. 553; *Worthington* v. *Curtis*, 1 Ch. D. 419; 45 L. J. Ch. 259; 33 L. T. 828. But under the Friendly Societies Act, 1924, and the Industrial Assurance Act, 1923, assurances may be made on children's lives for certain specified small sums.

(*m*) *Howard* v. *Refuge Friendly Society*, 54 L. T. 644; 2 T. L. R. 474; *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92; 72 L. J. K. B. 638; 89 L. T. 94; 19 T. L. R. 474. But under the Industrial Assurance Act, 1923, friendly societies and industrial assurance companies may issue policies for the funeral expenses of a parent, grandparent, grandchild, brother or sister.

(*n*) *Evanson* v. *Crooks*, 106 L. T. 264.

to the extent of his debt, and the loss of this interest during the life of the debtor will not make the policy void (*o*).

The amount for which a policy of life insurance may be effected is limited to the interest of the insured at the time of effecting the policy (*p*). If, therefore, several policies are effected with different insurers, the insured cannot recover in all more than his insurable interest (*q*). But if at the time of effecting the policy the insured has an insurable interest, the policy will not be avoided because his interest subsequently terminates. Thus, if a creditor insures the life of his debtor, the policy is not avoided because he is afterwards paid the debt; and if he has kept up payment of the premiums, he can recover from the insurer (*r*).

A frequent condition of a policy of life insurance is that the policy shall be avoided if the assured should die by the hands of justice or by suicide. This, on considerations of public policy, would result even in the absence of any express condition (*s*), unless in the case of suicide the assured was of unsound mind (*t*). But an express condition may be so worded as to avoid the policy, even where the assured was of unsound mind when he committed suicide (*t*). Such an express condition is common, but is often qualified by a further condition that the avoidance of the policy shall not prejudice the *bona fide* interests of third persons based on valuable consideration (*u*).

(*o*) *Dalby* v. *India, etc., Life Assurance Co.*, 15 C. B. 265; 24 L. J. C. P. 2; 100 R. R. 389; *Law* v. *London, etc., Life Policy Co.*, 24 L. J. Ch. 196; 103 R. R. 61.

(*p*) *Ante*, p. 282. Premiums paid under a mere wager policy cannot be recovered (*Howard* v. *Refuge Friendly Society*, 54 L. T. 644; *Harse* v. *Pearl Life Assurance Co.* (*ubi supra*); but see *Elson* v. *Crookes*, 106 L. T. 462).

(*q*) *Hebdon* v. *West*, 3 B. & S. 579; 32 L. J. Q. B. 85; 129 R. R. 464.

(*r*) *Dalby* v. *India and London Assurance Co.*, 15 C. B. 365; 24 L. J. C. P. 2; 100 R. R. 389.

(*s*) *Amicable Society* v. *Bolland*, 4 Bli. (N.S.) 194; 33 R. R. 22.

(*t*) *Horn* v. *Anglo-Australian, etc., Insurance Co.*, 30 L. J. Ch. 511; 126 R. R. 819.

(*u*) See *White* v. *British Empire, etc., Insurance Co.*, L. R. 7 Eq. 394; 38 L. J. Ch. 53; *City Bank* v. *Sovereign Life Assurance Co.*, 50 L. T. 565; *Wigan* v. *English and Scottish Law Life Assurance*, [1909] 1 Ch. 291; 78 L. J. Ch. 120. In the case of *Ellinger* v. *Mutual Life Insurance Co. of New York*, [1905] 1 K. B. 31; 74 L. J. K. B. 39; 91 L. T. 733; 21 T. L. R. 20, the policy was based upon an application, stated to be the basis of the contract, containing a clause by which the assured "warranted and agreed" not to commit suicide, whether sane or insane, within a year. It was held

Where a husband has effected an insurance on his life for the benefit of his wife his executors can maintain an action on the policy, although the death of the husband was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under s. 11 of the Married Women's Property Act, 1882, fails by reason of her crime (*x*); but a resulting trust arises in favour of her husband, and his executors can recover the insurance money as part of his estate.

Assignment.—A policy of life assurance might always be, and still may be, the subject of an equitable assignment. And by the *Policies of Assurance Act*, 1867, any person entitled by assignment or other derivative title to a policy of insurance, and possessing at the time of action brought the right in Equity to receive and give a discharge for the moneys thereby assured, may sue at law in his own name to recover such moneys; but the right to sue does not arise until written notice of the date and purport of the assignment has been given to the assurance company at its principal place of business, or one of its principal places of business, in England, Scotland, or Ireland, and the date on which notice is given regulates the priorities of all claims under any assignment. A policy of life insurance may also be assigned under s. 136 of the Law of Property Act, 1925 (*y*), so as to give the assignee the legal right thereto and all legal remedies in respect thereof.

Accident Insurance.—A contract of accident insurance may be either a contract to pay a fixed sum on the happening of some particular accident, as in the case of insurance against accidents causing personal injury, or it may be a contract to indemnify the assured against some particular liability, as, for example, the insurance of an employer against claims under the Workmen's Compensation Act, or it may be both a contract to pay a fixed sum and a contract of indemnity.

A familiar type of the last class is the ordinary motor insurance policy, which usually comprises (*inter alia*):—

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that this warranty was a condition limiting the liability of the defendants upon the policy.

(*x*) *Cleaver* v. *Mutual Reserve Fund Association*, [1892] 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220.

(*y*) *Ante*, p. 164.

i. A contract of indemnity against loss of, or damage to, the car, acccessories, etc., from certain specified causes:

ii. A contract of indemnity against what is usually called "public liability," *i.e.*, against any claims made by third persons for loss of life or bodily injury or damage to property caused by, through, or in connection with the car. It is also frequently provided that this indemnity shall extend to any relative or friend of the assured whilst personally driving the insured car with the knowledge and consent of the insured:

iii. A contract to pay compensation to the insured and his or her wife or husband to a specified amount in the event of death or bodily injury solely caused by "violent, accidental, external and visible means" (*z*) (or similar words) in direct connection with the insured car.

It has been held that such a policy is an insurance on goods, *i.e.*, the motor car, within s. 4 of the Gambling Act, 1774, and only incidentally against third party risks, and therefore does not come within ss. 1—3 of that Act (*a*). It was also held in the same case that, where the policy purports to indemnify friends or relatives of the insured against third party risks, the insurers are liable to pay to the insured, as trustee for such relatives or friends, any sum that, as a result of an event to which the policy applies, they may become legally liable to pay to a third party (*b*).

(*z*) As to the meaning of these words see *Hamlyn* v. *Crown Accident Insurance Co.*, [1893] 1 Q. B. 750; 62 L. J. Q. B. 409; 68 L. T. 701; 9 T. L. R. 427; *Scarr* v. *General Accident Insurance Corporation*, [1905] 1 K. B. 837; 74 L. J. K. B. 227; 92 L. T. 128; 21 T. L. R. 173.

(*a*) See *ante*, p. 282.

(*b*) *Williams* v. *Baltic Insurance Association*, [1924] 2 K. B. 282; 93 L. J. Q. B. 819; 131 L. T. 671; 40 T. L. R. 668.

CHAPTER III.

BAILMENTS. CONTRACTS OF CARRIAGE AND AFFREIGHTMENT.

SECTION 1.—*Bailments.*

A bailment consists in the delivery by one person, termed the bailor, of the *possession* of goods to another person, termed the bailee, upon some condition or trust (*a*).

In the leading case of *Coggs* v. *Bernard* (*b*) bailments were classified as follows:—

1. *Depositum.*—When goods are delivered to the bailee to be kept for the use of the bailor, and where the bailee is to have no reward.

2. *Commodatum.*—When goods are lent to a friend gratis, to be used by him.

3. *Locatio rei.*—When goods are let out for hire.

4. *Vadium.*—When goods are pawned or pledged.

5. *Locatio operis faciendi.*—When goods are delivered to be kept or carried, or for something to be done to them, for a reward to be paid by the bailor to the bailee.

6. *Mandatum.*—When goods are delivered to someone who is to carry them or do something to them gratis.

From the above it may be seen that bailments may also be classified as:—

1. Those exclusively for the benefit of the bailor (*depositum* and *mandatum*).

2. Those exclusively for the benefit of the bailee (*commodatum*).

3. Those partly for the benefit of the bailor and partly for the benefit of the bailee (*locatio rei*, *vadium*, *locatio operis faciendi*).

(*a*) *R.* v. *McDonald*, 15 Q. B. D., at pp. 327, 328; 52 L. T. 583.
(*b*) 2 Ld. Raym. 909.

With regard to all bailments the following points must be noted:—

A bailment can exist only in respect of personal chattels. Thus permission to use real property, as, *e.g.*, a shed, does not constitute a bailment but merely confers a licence (*c*).

A bailment consists in the delivery of the *possession* of goods; a delivery of goods by a man to his servant does not therefore create a bailment, because the servant merely has the custody or detention, the master retaining constructive possession by the agency of his servant (*d*).

A *constructive delivery* of goods may take place by *attornment*, *i.e.*, when, without any physical transfer, a change in the nature of a person's possession is effected by agreement (*e*). Thus, if a vendor of goods, instead of delivering them to the purchaser, agrees to keep them in his warehouse without charge, there is a constructive delivery from the vendor to the purchaser, and a constructive redelivery from the purchaser to the vendor as bailee (*f*). So also if goods are in the possession of a third person and such third person on the instructions of the vendor agrees to hold them on behalf of the purchaser, he becomes, by attornment, a bailee for the latter (*g*). Where, however, without any request or previous communication, goods are sent to or placed upon the premises of a person who has in no way held himself out as willing to receive them, he is not thereby constituted a bailee of such goods (*h*).

A bailment may be constituted by the mere delivery and acceptance of possession, entirely independently of any contract between the parties. Accordingly an infant may be a bailee of goods although they were not necessaries in respect of which he

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(*c*) *Williams* v. *Jones*, 3 H. & C. 602; 13 L. T. 300; 140 R. R. 631.

(*d*) *R.* v. *Cooke*, L. R. 1 C. C. R., at p. 300; 40 L. J. M. C. 68.

(*e*) *Mills* v. *Charlesworth*, 25 Q. B. D., at p. 425.

(*f*) *Castle* v. *Sworder*, 6 H. & N. 828; 30 L. J. Ex. 310; *Elmore* v. *Stone*, 1 Taunt. 458; 10 R. R. 578.

(*g*) *Gosling* v. *Birnie*, 7 Bing. 339; 9 L. J. C. P. 105; 33 R. R. 497; *Holl* v. *Griffin*, 10 Bing. 246; and see s. 45 (3) of the Sale of Goods Act, 1893. See also *Dublin City Distillery, Ltd.* v. *Doherty*, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81, where the authorities on constructive possession are reviewed.

(*h*) *Lethbridge* v. *Phillips*, 2 Stark. 544; *Howard* v. *Harris*, 1 C. & E. 253; *Neuwith* v. *Over Darwen, etc., Society*, 63 L. J. Q. B. 290; 70 T. L. R. 374; 10 T. L. R. 282.

could make a valid contract (*i*). In most cases, however, a bailment is accompanied by an express contract, so that the rights and liabilities of a bailor and bailee are of two kinds, *i.e.*, those which arise at Common Law from the mere bailment, and those which have their origin in any express contract (*k*).

The bailee during the bailment has what is sometimes called a "special property" in the goods; that is to say, although the general property remains in the bailor, the bailee has the *right to possess*, and hence he may exercise over the goods all rights annexed by law to the possession except so far as they may be inconsistent with the nature of the bailment or excluded by express contract: thus as against a wrongdoer he may maintain an action for trespass, conversion, or negligence (*l*). If, however, the bailee deals with the goods in a manner which is inconsistent with the nature of the bailment, or contrary to its express terms, there is a determination of the bailment, and the right to the possession revests in the bailor, who may maintain an action against the bailee for conversion (*m*), and for any damage caused to the goods in consequence of his improper dealing with them, unless such damage is due to a cause independent of his acts and inherent in the goods themselves (*n*). If, on determination of the bailment, the bailee refuses to redeliver or cannot redeliver the goods, he is liable, according to the circumstances of the case, to an action of detinue, conversion, negligence or

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(*i*) *R.* v. *McDonald*, 15 Q. B. D. 323; 52 L. T. 583.

(*k*) See *Corbett* v. *Packington*, 5 L. J. K. B. 142; 6 B. & C. 268; *Lilley* v. *Doubleday*, 7 Q. B. D. 510; 51 L. J. Q. B. 310; 44 L. T. 814.

(*l*) *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 201; 61 L. J. Q. B. 709; 67 L. T. 361; 8 T. L. R. 549; *The Winkfield*, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668. As to the rights of the bailor to bring an action, see *post*, Part III., Chapter I., section 2.

(*m*) *Cooper* v. *Willomatt*, 1 C. B. 672; 14 L. J. C. P. 109; 68 R. R. 798; *Plasycoed Collieries Co., Ltd.* v. *Partridge, Jones & Co., Ltd.*, [1912] 2 K. B., at p. 351; 81 L. J. K. B. 723; 106 L. T. 426. But see *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232; *Halliday* v. *Holgate*, L. R. 3 Ex. 299; 37 L. J. Ex. 174 (a transfer by a pledgee of the goods pledged does not revest in the pledgor the right to possess).

(*n*) *Coggs* v. *Bernard*, 2 Ld. Raym., at p. 915; *Lilley* v. *Doubleday* (*ubi supra*). In the latter case the bailee contracted to warehouse goods at a particular place, but warehoused part of them at another place, where, without any negligence on his part, they were destroyed by fire. *Held*, that, in consequence of his breach of contract, he was liable for the loss of the goods.

breach of contract (*o*). If during the bailment, the goods are lost or injured by his negligence or default, he is liable to an action for damages, which, if based merely on a breach of his Common Law duties, is an action of tort, but if based upon the breach of any express contract, is an action of contract (*p*); but, subject to exceptions in the case of persons exercising a public employment, he is not liable for loss or damage not due to any default on his part (*q*): the onus is, however, upon him to show that any loss or damage was not attributable to his default (*r*).

In any action brought by a bailor against a bailee the latter is, as a general rule, estopped or precluded from denying the title of the former or setting up any title in himself or in a third party. But the bailee may show that the title of the bailor has determined since the bailment: so also he may set up a *jus tertii* if he has been evicted by title paramount or if he defends his possession upon the right and title and by the authority of the tertius (*s*). But he cannot set up the title of another if he accepted the goods with the knowledge of the adverse claim (*t*).

Gratuitous Bailment.—*Depositum* and *mandatum* are alike in two respects, namely (i) that they are for the benefit of the bailor; and (ii) that they are gratuitous, so that the bailee is to have no reward.

Commodatum is a gratuitous loan for the benefit of the bailee. It is a loan of something to be returned in *specie*, and does not, therefore, include a loan of money (*mutuum*) in which the *property*

(*o*) See *Wilkinson* v. *Verity*, L. R. 6 C. P. 206; 40 L. J. C. P. 141; 24 L. T. 32; *Coldman* v. *Hill*, 120 L. T. 412; 34 T. L. R. 86.

(*p*) *Turner* v. *Stallibrass*, [1898] 1 Q. B. 56; 67 L. J. Q. B. 72; 77 L. T. 482. A bailee may, however, by special contract, exempt himself from liability for negligence, and, except in the case of a common carrier, a stipulation to that effect will relieve him from liability for the negligence of his servants, even though not expressly mentioned (*Rutter* v. *Palmer*, [1922] 2 K. B. 87; 91 L. J. K. B. 657; 127 L. T. 419; 38 T. L. R. 555).

(*q*) *Taylor* v. *Caldwell*, 3 B. & S., at pp. 838, 839; 32 L. J. Q. B. 164; 129 R. R. 573.

(*r*) *Coldman* v. *Hill* (*ubi supra*). In case of theft of the goods without his default, he is liable if he does not give notice to the bailor within a reasonable time, unless he can prove that, if he had given notice, the goods would not have been recovered (*id.*).

(*s*) *Biddle* v. *Bond*, 6 B. & S. 225; 34 L. J. Q. B. 137; 141 R. R. 387; *Rogers* v. *Lambert*, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 106.

(*t*) *Ex p. Davies, re Sadler*, 19 Ch. D. 86; 45 L. T. 632.

in the money passes to the borrower, who is not bound to restore the identical coins, but an equivalent amount (*u*).

If a gratuitous bailee fails to carry out what he has undertaken to do no action will lie against him for breach of his undertaking, as such an action would be an action for breach of contract, and could not be supported in the absence of consideration. But if the bailee enters upon the bailment, as by accepting a deposit of goods or undertaking to perform a service, he is liable to the bailor for any damages caused by his default or negligence, such an action being an action of tort, to which the doctrine of consideration does not apply (*x*). If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in *Coggs* v. *Bernard* (*y*).

Conversely, the bailor is responsible to the bailee for injuries caused to the latter through defects in the chattel of which he is aware; as, for instance, if he lends to the bailee a vicious and unmanageable horse without disclosing its dangerous qualities, and the bailee is in consequence injured (*z*).

Bailment for Valuable Consideration.—The remaining bailments are alike in that they are for valuable consideration and for the benefit of both bailor and bailee, and that the rights and liabilities of the parties are usually governed by express contract.

Apart from any express contract the bailee, in *locatio rei*, is under the same liability for default or negligence as in the preceding cases of bailment. The bailor, however, is subject to a higher obligation with regard to defects in the chattel let out to hire: it is not sufficient for him merely to disclose such

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(*u*) See *R.* v. *Burgon*, Dears. & B. 11; 25 L. J. M. C. 105.

(*x*) As to the liability of bailees for negligence, see *post*, Part III., Chapter III.

(*y*) *Skelton* v. *London and North Western Railway Co.*, L. R. 2 C. P., at p. 636; 36 L. J. C. P. 49. The student must note that *Coggs* v. *Bernard* (2 Ld. Raym. 909) was an action of *tort* (see *Corbett* v. *Packington*, 6 B. & C., at p. 272; 5 L. J. K. B. 142), and must also distinguish the present statement in the text from the rule previously given (*ante*, p. 63), namely, that, in the case of *commodatum*, the parting with the possession of goods is sufficient consideration to support an express promise by the bailee to re-deliver the goods.

(*z*) See *Blakemore* v. *Bristol and Exeter Railway Co.*, 8 E. & B. 1035; 27 L. J. Q. B. 167; *Coughlin* v. *Gillison*, [1899] 1 Q. B. 145; 68 L. J. Q. B. 147.

defects; his obligation is to supply a chattel "as fit for the purpose for which it is hired as care and skill can render it" (*a*).

The bailment of *vadium* will be dealt with in the next chapter. There remains, therefore, only the bailment of *locatio operis faciendi*. In this case, as in the first three cases, if the bailor is aware that the chattel bailed is of a dangerous character he is bound to give notice to the bailee, and is responsible for his omission to do so (*b*). The liability of the bailee varies according as he is a private person or a person exercising a public employment. A private person, like other bailees, is liable for loss of, or damage to, the goods only where it is caused by his default or negligence; but a person exercising a public employment for reward is an insurer of the goods entrusted to him, and, subject to certain limitations to be mentioned hereafter, is liable for all loss or damage, whether or not caused by negligence on his part. Persons so liable as exercising a public employment are innkeepers and common carriers.

Innkeepers.—An inn is a house the owner of which holds out that he will receive all "travellers and sojourners" who are willing to pay a price adequate to the accommodation provided, and who come in a condition in which they are fit to be received (*c*). He is bound to provide "lodging and entertainment" at a reasonable price (*d*), provided that his house is not full and that either the price of the guest's entertainment is tendered to him or such circumstances occur as will dispense with that tender (*e*). For any unreasonable refusal on his part an action (*f*) or indictment (*g*) lies against him.

At Common Law an innkeeper has a lien on the goods of his

(*a*) *Hyman* v. *Nye*, 6 Q. B. D., at p. 687. See *post*, Part III., Chapter II.

(*b*) *Farrant* v. *Barnes*, 11 C. B. (N.S.) 553; 31 L. J. C. P. 137; 132 R. R. 167.

(*c*) *Thompson* v. *Lacy*, 3 B. & Ald., at p. 285. Approved in *Orchard* v. *Bush* (*infra*).

(*d*) *Thompson* v. *Lacy* (*ubi supra*).

(*e*) *R.* v. *Ivens*, 7 C. & P., at p. 219; 48 R. R. 780. As to when an inn is full, see *Brown* v. *Brandt*, [1902] 1 K. B. 696; 71 L. J. K. B. 367; 80 L. T. 625.

(*f*) *Hawthorn* v. *Hammond*, 1 C. & K. 404; and see *Fell* v. *Knight*, 8 M. & W. 269; 10 L. J. Ex. 277; 58 R. R. 698.

(*g*) *R.* v. *Ivens* (*ubi supra*); and see *R.* v. *Rymer*, 2 Q. B. D. 136; 46 L. J. M. C. 168; 35 L. T. 774.

guests and the goods of their visitors (*h*), and, on the other hand, he is responsible for all loss or damage to their goods and the goods of their visitors (*i*), except such as arises from the act of God or the King's enemies, or the fault of the guest himself (*h*).

In order to create the above rights and liabilities, (i) the house must be an inn; and (ii) the guest must be a traveller (*j*).

i. The house must be an inn, offered to the use of the public as such (*k*). A lodging-house or a boarding-house is not an inn, and the proprietor of such an establishment is only liable for negligence (*l*). Nor is a restaurant an inn (*m*), nor a refreshment bar which, though under the same roof as an inn, carries on a separate business and has a separate entrance (*n*).

ii. The guest must be a "traveller or sojourner"; but it is not necessary that he should have come for more than a temporary refreshment (*o*). A guest is a person who uses the inn in order to take what it can give: he need not stay the night; it is sufficient if he uses the inn as an inn for the purpose merely of getting a meal there (*p*), or if he is given a room for washing and dressing and his luggage is taken there for that purpose (*q*). But a person who makes a special contract with an innkeeper for

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(*h*) *Thompson* v. *Lacy* (*ubi supra*); *Richmond* v. *Smith*, 8 B. & C. 9; 6 L. J. K. B. 279; 32 R. R. 326; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B., at p. 21; 60 L. J. Q. B. 209; and as to the meaning of "act of God" and King's enemies, see *post*, p. 307.

(*i*) *Cryan* v. *Hotel Rembrandt, Ltd.*, 133 L. T. 395; 41 T. L. R. 287.

(*j*) *Calye's Case*, 8 Coke, 32; *R.* v. *Rymer*, 2 Q. B. D., at p. 139; 46 L. J. M. C. 168.

(*k*) *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B., at p. 19; 60 L. J. Q. B. 209.

(*l*) *Scarborough* v. *Cosgrove*, [1905] 2 K. B. 805; 74 L. J. K. B. 892; following *Dansey* v. *Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 117; 97 R. R. 414.

(*m*) *Ultzen* v. *Nicholls*, [1894] 1 Q. B. 92; 63 L. J. Q. B. 289; 70 L. T. 140.

(*n*) *R.* v. *Rymer* (*ubi supra*). This and the preceding case were affirmed and distinguished in *Orchard* v. *Bush* (*infra*), where the plaintiff had a meal in a dining-room which was part of the inn. It may be noted that the landlord of a fully licensed house, if it is not in fact an inn, is under no legal obligation to supply reasonable refreshment to all comers, and has a Common Law right (apart from s. 80 of the Licensing (Consolidation) Act, 1910) to require a person who is not a traveller to leave the house and, on refusal, to eject him (*Sealey* v. *Tandy*, [1902] 1 K. B. 296; 71 L. J. K. B. 41).

(*o*) *Calye's Case* (*ubi supra*).

(*p*) *Orchard* v. *Bush*, [1898] 2 Q. B. 284; 67 L. J. Q. B. 150; 78 L. T. 557.

(*q*) *Medawar* v. *Grand Hotel Co.* (*ubi supra*).

board and lodging is not a traveller (*r*). And even a person who has been received as a traveller does not necessarily retain that character for an indefinite time, and may become a boarder or lodger. Whether this is the case is a question of fact, and one of the ingredients for determining it is the length of time that has elapsed since his arrival: if he has lost the character of traveller, the innkeeper is entitled to give him reasonable notice to leave (*s*).

The innkeeper is not liable if the goods are by the guest's direction placed outside the hotel, *e.g.*, if a horse is so sent to pasture (*t*); nor if they are lost by the guest's own negligence (*u*).

The Common Law liability of innkeepers was restricted by the *Innkeepers Act*, 1863, which enacts (*x*) that no innkeeper shall be liable to make good any loss or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than £30, except (1) where the goods are stolen, lost, or injured through the wilful act, neglect, or default of the innkeeper or any person in his employ; or (2) where the goods are deposited with him expressly (*y*) for safe custody, in which latter case he may demand that the goods shall be placed in a sealed box or other receptacle. If an innkeeper refuses to receive goods for safe custody, or if by his default the guest is unable to so deposit them, he is not to have the benefit of the Act (*z*); and he must cause at least one *printed* copy of s. 1 to be exhibited in a conspicuous part of the hall or entrance to the inn, and will only be entitled to the benefit of the Act whilst it is so exhibited (*a*). The copy should be an exact one, and if there is any material omission the innkeeper is not protected (*b*).

Innkeeper's lien and right of sale.—An innkeeper has no right

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(*r*) *Thompson* v. *Lacy* (*ubi supra*); *Dansey* v. *Richardson* (*ubi supra*).

(*s*) *Lamond* v. *Richard*, [1897] 2 Q. B. 541; 66 L. J. Q. B. 315; 76 L. T. 141.

(*t*) *Calye's Case* (*ubi supra*).

(*u*) *Burgess* v. *Clements*, 4 M. & S. 306; 16 R. R. 473; *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131; *Oppenheimer* v. *White Lion Hotel*, L. R. 6 C. P. 515; *Medawar* v. *Grand Hotel Co.* (*ubi supra*).

(*x*) 26 & 27 Vict. c. 41, s. 1.

(*y*) See *Whitehouse* v. *Pickett*, [1908] A. C. 357; 77 L. J. P. C. 89; 99 L. T. 367; 24 T. L. R. 767.

(*z*) 26 & 27 Vict. c. 41, s. 2.

(*a*) *Id.*, s. 3; *Hodgson* v. *Ford*, 8 T. L. R. 722.

(*b*) *Spice* v. *Bacon*, 2 Q. B. D. 463; 46 L. J. Q. B. 713.

to detain his guest's person till his bill is paid (*c*), but he has a general (*d*) lien on property brought by the guest to the inn, or sent to him there, notwithstanding even that the property does not belong to the guest (*e*), and the innkeeper is aware of that fact; *e.g.*, if a commercial traveller brings with him, or has sent to him, samples of goods, the innkeeper has a right of lien thereon (*f*). And where a husband and wife came together to an inn (so that, of course, credit was given to the husband), yet the innkeeper's lien was held to exist on property brought with them, although it was the separate property of the wife (*g*). The lien also exists over property, though it may not be ordinary traveller's luggage (*h*); but there is no lien in respect of goods the property of a third person sent to the guest in the inn for a temporary purpose, *e.g.*, a piano or other article on hire (*i*). When an innkeeper is entitled to a lien over carriages and horses, such lien is not limited to the charge for the keep of the horses and the care of the carriages, but extends to the whole charges against the guest (*k*). An innkeeper who accepts security does not thereby waive his Common Law lien on the goods of his guest, unless the nature of the security, or the circumstances under which it is given, are inconsistent with the retention of the lien (*l*).

By the *Innkeepers Act*, 1878, an innkeeper, "in addition to his ordinary lien," has the right to sell by public auction any "goods, chattels, carriages, horses, wares, or merchandise" deposited or left with him or in the inn or its stables or other premises appurtenant or belonging thereunto, where the person depositing or leaving them is indebted to him for board or lodging

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(*c*) *Tunbolf* v. *Alford*, 3 M. & W. 248; 7 L. J. Ex. 260.

(*d*) *Mulliner* v. *Florence* (*infra*).

(*e*) Even if the goods were brought without the owner's knowledge (*Robinson* v. *Walter*, 3 Bulst. 269; *Stirt* v. *Drungold*, 3 Bulst. 289) or were stolen, if the innkeeper did not know that when he received them (*Johnson* v. *Hill*, 3 Stark. 172; 23 R. R. 764).

(*f*) *Robins* v. *Gray*, [1895] 2 Q. B. 501; 65 L. J. Q. B. 44; 73 L. T. 252.

(*g*) *Gordon* v. *Silber*, 25 Q. B. D. 491; 59 L. J. Q. B. 507; 63 L. T. 283.

(*h*) *Snead* v. *Watkins*, 1 C. B. (N.S.) 267; 26 L. J. C. P. 57; 107 R. R. 654; *Threlfall* v. *Barwick*, L. R. 10 Q. B. 210; 44 L. J. Q. B. 87.

(*i*) *Broadwood* v. *Granara*, 10 Ex. 417; 24 L. J. Ex. 1; 102 R. R. 651.

(*k*) *Mulliner* v. *Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700; 26 W. R. 385; 38 L. T. 167.

(*l*) *Angus* v. *McLachlan*, 23 Ch. D. 351; 52 L. J. Ch. 587; 48 L. T. 863.

or for the keep and expenses of any horse or other animal left with him or standing at livery in his stables or in fields occupied by him. But no such sale may be made until the goods, etc., have been six weeks in his custody, or upon his premises, without such debt having been paid and satisfied; nor until one month after he has advertised the intended sale in one London newspaper and one country newspaper circulating in the district where the goods, etc., were deposited or left.

The liability of an innkeeper for injuries caused to his guest's person will be discussed later (*m*).

SECTION 2.—*Contracts of Carriage and Affreightment.*

Common Carriers.—A carrier of goods who is not a common carrier is merely subject to the ordinary liabilities of a bailee (*n*), but a common carrier is, subject to exceptions, an insurer of the goods carried. "A common carrier is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or money of all such persons as think fit to employ him. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation *pro hac vice*" (*o*). Thus a furniture remover who does not hold himself out as ready to carry for anyone who applies, but before carrying requires to inspect the furniture and makes a special contract as to its carriage, is not a common carrier (*p*). It is not, however, necessary, in order to render a person a common carrier, that he should ply between fixed termini (*q*).

A carrier is a common carrier only of such goods as he publicly

(*m*) *Post*, Part III., Chapter III.

(*n*) *Fagan* v. *Green and Edwards*, [1926] 1 K. B., at p. 106; 95 L. J. K. B. 363; 134 L. T. 191.

(*o*) Macnamara on Carriers by Land (2nd ed.), p. 11; approved in *Watkins* v. *Cottell*, [1916] 1 K. B., at p. 14; 85 L. J. K. B. 287; 114 L. T. 333; 32 T. L. R. 91.

(*p*) *Ibid.*, and see *Scaife* v. *Farrant*, L. R. 10 Ex. 358; 44 L. J. Ex. 234; 33 L. T. 278.

(*q*) *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 43 L. J. Ex. 216; 31 L. T. 95.

professes to carry (*r*), and he is bound to carry all goods of that description which are offered to him for carriage, without imposing any unreasonable conditions, provided that he has sufficient accommodation and reasonable payment is tendered, or the sender is ready and willing to pay it, and that the goods are of a proper kind (*s*). It is also his duty at Common Law to provide a vehicle or other means of carriage reasonably fit and sufficient to carry the goods, having regard to their nature and the character of the transit, and to load or stow the goods properly, so that they may be safely carried to their destination (*t*). At the end of the transit, but not before, he has a lien upon the goods for his charges (*u*).

A common carrier is not, in the absence of a special contract, bound to deliver within any given time, but only within a time which is reasonable in the circumstances of the case, and he is not responsible for delay, so long as it "is attributable to causes beyond his control and he has neither acted negligently nor unreasonably" (*x*). Nor is he bound to travel by the shortest route, but only by the route by which he usually travels and professes to go (*y*).

In the absence of any express stipulation limiting his liability,

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(*r*) *Dickson* v. *Great Northern Railway Co.*, 18 Q. B. D., at p. 183; 56 L. J. Q. B. 111; *Great Northern Railway Co.* v. *L. E. P. Transport and Depository*, [1922] 2 K. B., at p. 752; 91 L. J. K. B. 807; 127 L. T. 664; 38 T. L. R. 711.

(*s*) Bullen and Leake's Pleadings (3rd ed.), pp. 122, 227; and see *Garton* v. *Bristol and Exeter Railway Co.*, 1 B. & S., at p. 162; 30 L. J. Q. B. 273; 124 R. R. 476; *Great Western Railway Co.* v. *Sutton*, L. R. 4 H. L., at p. 237; 38 L. J. Ex. 177. Actual tender of payment is not necessary (*Pickford* v. *Grand Junction Railway Co.*, 8 M. & W. 372; 10 L. J. Ex. 342; 58 R. R. 742).

(*t*) *L. & N. W. Railway Co.* v. *Hudson & Sons, Ltd.*, [1920] A. C., at p. 336; 89 L. J. K. B. 323; 122 L. T. 530

(*u*) *Wiltshire Iron Co.* v. *Great Western Railway Co.*, L. R. 6 Q. B. 776; 40 L. J. Q. B. 308; 23 L. T. 666.

(*x*) *Hick* v. *Raymond and Reid*, [1893] A. C., at p. 33; 62 L. J. Q. B. 98. He is not therefore liable for delay caused by a strike, even of his own servants, unless it resulted from his own unreasonable conduct (*Sims* v. *Midland Railway Co.*, [1913] 1 K. B. 103; 82 L. J. K. B. 67). In case of delay the carrier becomes an agent of necessity and may sell the goods if (i) a real business necessity exists for the sale, *i.e.*, where the goods are perishing, and (ii) it is commercially impossible to get the owner's instructions as to what is to be done (see *Springer* v. *Great Western Railway Co.*, [1921] 1 K. B. 257; 124 L. T. 79; 89 L. J. K. B. 1010.

(*y*) *Myers* v. *L. & S. W. Railway Co.*, L. R. 5 C. P., at p. 3; 39 L. J. C. P. 57; 21 L. T. 460.

a common carrier was at Common Law liable for all loss of or injury to the goods carried, except such as arose from the following perils:—

1. The act of God, *i.e.*, "any accident as to which he can show that it is due to natural causes (*e.g.*, exceptionally bad weather) directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him" (*z*).

2. The King's enemies, *i.e.*, the forces of a State with which this country is at war (*a*).

3. The inherent vice of the thing carried, *i.e.*, its "inherent unfitness for the carriage contemplated, by reason either of its nature, or condition, or packing" (*b*). Moreover where a person delivers to a carrier goods of such a dangerous nature as to require extraordinary care he is bound to give notice of their nature to the carrier, and, in default of so doing, is liable for any damage caused thereby (*c*).

It must be noticed that these three exceptions only limit the liability, not the duty, of the carrier (*d*). It is the duty of the carrier to do what he can by reasonable skill and care to avoid all

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(*z*) *Nugent* v. *Smith*, 1 C. P. D., at p. 444; 45 L. J. C. P. 697.

(*a*) *Russell* v. *Niemann*, 17 C. B. (N.S.) 163; 34 L. J. C. P. 10; 142 R. R. 301. It does not include pirates (*ibid.*).

(*b*) *Lister* v. *Lancashire and Yorkshire Railway Co.*, [1903] 1 K. B. 878; 72 L. J. K. B. 385; 88 L. T. 561; *London and North Western Railway Co.* v. *Hudson & Sons, Ltd.*, [1920] A. C., at pp. 331, 332, 333, 347; 89 L. J. K. B. 323; 122 L. T. 530. See also *Nugent* v. *Smith* (*ubi supra*) (injury to a mare caused partly by bad weather and partly by its own fright and struggles); *Blower* v. *Great Western Railway Co.*, L. R. 7 C. P. 655; 41 L. J. C. P. 288 (escape of a bullock from a railway truck, due entirely to its own unruliness, the truck being in every respect proper and reasonably fit for its conveyance); *Richardson* v. *North Eastern Railway Co.*, L. R. 7 C. P. 75; 41 L. J. C. P. 60 (escape of greyhound through a deficiency in the collar and strap supplied by the owner for securing it during conveyance); *Barbour* v. *South Eastern Railway Co.*, 34 L. T. 67 (damage to furniture through improper packing by owner). It has been held that the carrier's knowledge at the time of the receipt of the goods that they were insufficeintly packed does not preclude him from setting this up as a defence (*Gould* v. *South Eastern and Chatham Railway Co.*, [1920] 2 K. B. 186; 89 L. J. K. B. 700; 123 L. T. 256); see, however, *London and North Western Railway Co.* v. *Hudson*, [1920] A. C., at p. 340.

(*c*) *Farrant* v. *Barnes*, 11 C. B. (N.S.) 553; 31 L. J. C. P. 137; 132 R. R. 667; *Great Northern Railway Co.* v. *L. E. P. Transport, etc., Co.*, [1922] 2 K. B. 742; 91 L. J. K. B. 807; 127 L. T. 664; 38 T. L. R. 711 (reviewing the authorities).

(*d*) *Blower* v. *Great Western Railway Co.*, L. R. 7 C. P., at p. 663; 41 L. J. C. P. 268.

perils, and he is liable if his negligence has brought about the peril (*e*), or has increased the injury caused by it (*f*). Moreover any special stipulations limiting the liability of the carrier apply only when the contract is being carried out and not when the carrier is doing something which he has not contracted to do; they do not accordingly apply when the goods are carried by a route wholly different from the stipulated route (*g*).

A common carrier may, subject to certain statutory exceptions to be noted later, limit his liability by special stipulations. In such a case it is necessary to look at the terms of the particular contract to see whether the carrier has thereby ceased altogether to occupy the position of a common carrier so that he has become merely a bailee for reward, or whether he remains subject to the liability of a common carrier, save so far as it has been expressly varied by the contract (*h*).

Where a common carrier makes a stipulation limiting his liability for loss or damage, it will not exempt him from liability for loss or damage arising from his negligence, unless the stipulation clearly and expressly exempts him from liability for negligence or its language is so wide as to cover all loss or damage, however originating, as *e.g.*, if it includes all damage "however caused" or "under any circumstances." Where, however, such a stipulation is made by a carrier who is not a common carrier he is relieved, even if the loss or damage arises from his negligence, because such a stipulation would have no effect unless it protected him from negligence (*i*).

Duration of liability.—The liability of a carrier begins as soon as the goods are delivered for transit to him or his authorised

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(*e*) *Gill* v. *Manchester Railway Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89 (negligence of a porter in letting a restive cow out of a truck).

(*f*) *Notara* v. *Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 26 L. T. 442.

(*g*) *London and North Western Railway Co.* v. *Neilson*, [1922] 2 A. C. 263; 91 L. J. K. B. 680; 127 L. T. 469; 38 T. L. R. 653.

(*h*) *Great Northern Railway Co.* v. *L. E. P. Transport, etc., Co.* (*ubi supra*) (reviewing the authorities).

(*i*) *Travers, Ltd.* v. *Cooper*, [1915] 1 K. B. 73; 83 L. J. K. B. 1787; 111 L. T. 1088; 30 T. L. R. 703; *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B. 560; 90 L. J. K. B. 1353; 126 L. T. 154; 37 T. L. R. 940; *Fagan* v. *Green and Edwards, Ltd.*, [1926] 1 K. B. 102; 95 L. J. K. B. 363; 134 L. T. 191; see also *Rutter* v. *Palmer*, *ante*, p. 299.

agent (*k*), provided that the delivery is not an unreasonable time before the transit commences (*l*). It ends only with delivery of the goods at their destination: if, therefore, the goods are delivered to a carrier, to be carried partly by him and partly by his sub-contractor (as, *e.g.*, where goods are delivered to a railway company, to be carried partly on their own line and partly on another line), his liability continues until delivery, unless it is limited by contract to that part of the transit during which the goods are carried by him (*m*). But the carrier in whose hands the goods are when the damage or loss occurs may also be sued in contract if the contract of carriage was made for his benefit or by his authority (*n*), and he is also liable for his own default or negligence (*o*). If the goods are to be fetched by the consignee from the station or office of the carrier the liability as a common carrier lasts only for a reasonable time after the consignee has notice of their arrival, and the carrier is then liable for his default or negligence only as a bailee (*p*).

The person to sue.—An action for breach of contract can be brought against the carrier only by the person who contracted with him (*q*), but an action which is based upon breach of his Common Law duties, independently of any contract, is an action of tort (*r*), which can also be brought by the owner (*s*) or bailee (*t*) of the goods.

(*k*) *Colepepper* v. *Good*, 5 C. & P. 380.

(*l*) *Great Western Railway Co.* v. *Bunch*, 13 A. C. 31; 57 L. J. Q. B. 361; 58 L. T. 128.

(*m*) *Muschamp* v. *Lancaster and Preston Railway Co.*, 8 M. & W. 421; 10 L. J. Ex. 460; 58 R. R. 758; *Bristol and Exeter Railway* v. *Collins*, 7 H. L. 194; 29 L. J. Ex. 41. See also s. 12 of the Railways Regulation Act, 1871, *post*, p. 314.

(*n*) *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Co.*, L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; 28 L. T. 587.

(*o*) *Foulkes* v. *Metropolitan Railway Co.*, 5 C. P. D. 157; 49 L. J. C. P. 361; 40 L. T. 180.

(*p*) *Shepherd* v. *Bristol and Exeter Railway Co.*, L. R. 3 Ex. 189; 37 L. J. Ex. 113; 18 L. T. 528; *Chapman* v. *Great Western Railway Co.*, 5 Q. B. D. 278; 49 L. J. Q. B. 420; 42 L. T. 252.

(*q*) *Davis* v. *James*, 5 Burr. 2680; *Moore* v. *Wilson*, 1 T. R. 659; 1 R. R. 347; *Dunlop* v. *Lambert*, 6 Cl. & Fin. 600; 49 R. R. 143. As to goods sent by a vendor to a purchaser, see *post*, Chapter IV., and as to the right of a consignee or indorsee to sue on a bill of lading, see *post*, pp. 327, 340.

(*r*) *L. & N. W. Railway Co.* v. *Hudson*, [1920] A. C., at p. 333; 89 L. J. K. B. 323; 122 L. T. 530.

(*s*) *Meux* v. *Great Eastern Railway Co.*, [1895] 2 Q. B. 387; 64 L. J. Q. B. 657; 73 L. T. 247, and cases there cited.

(*t*) *The Winkfield*, [1902] P. 42; 71 L. J. P. 21; 85 L. T. 668.

Limitation of liability by statute.—By s. 1 of the *Carriers Act*, 1830, which applies only to carriers by land, it was enacted that no common carrier by land for hire shall be liable for any loss of, or injury to, any valuable articles therein named (*u*), contained in any parcel which shall have been delivered, either to be carried for hire or to accompany the person of any passenger, when the value [*i.e.*, the invoice price (*x*)] of those articles shall exceed £10 (*y*); unless, at the time of the delivery of such parcel to be carried, the value and nature of such articles therein contained shall have been declared, and an increased rate of charge paid, or agreed to be paid (*z*). The scale of increased charges must be legibly notified in a conspicuous part of the office or warehouse, and is then binding without proof of its having come to any customer's knowledge (*a*). Carriers who omit to exhibit such notification or to give a receipt for the increased charge when required are excluded from the benefit of the Act, and are liable to refund the increased charge (*b*).

The protection given by the Act applies not only to loss of the goods but to all damages consequential to any loss, whether temporary or permanent (*c*), even though the loss is due to negligence (as distinct from wilful damage to or conversion of the goods), and even though through negligence the goods have been put out short of the station for which they were destined or carried beyond it (*d*). But it does not apply to protect the carrier from

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(*u*) *I.e.*, gold or silver coin, manufactured or unmanufactured gold or silver, precious stones, jewellery, watches, clocks or timepieces, bills, notes of any bank in Great Britain or Ireland, orders, notes or securities for payment of money (English or foreign), stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks, furs, or lace, or any of them (11 Geo. 4 and 1 Wm. 4, c. 68, s. 1).

(*x*) *Blanckensee* v. *London and North Western Railway Co.* (1882), 45 L. T. 761.

(*y*) Under the Railways Act, 1921 (*post*, p. 317), silk is excluded from the articles in note (*u*) and £10 is raised to £25. The section will also apply to carriage by water by a common carrier by land who is also a carrier by water.

(*z*) If the value and nature of the goods has been declared the carrier retains his common law liability if he accepts the goods for carriage without demanding the increased charge or requiring it to be either paid or promised (*Great Northern Railway Co.* v. *Behrens*, 7 H. & N. 950; 31 L. J. Ex. 299; 8 L. T. 828; 123 R. R. 580). (*a*) S. 2.

(*b*) S. 3. See *Hart* v. *Baxendale*, 6 Ex. 769; 21 L. J. Ex. 123; 86 R. R. 465.

(*c*) *Millen* v. *Brasch*, 10 Q. B. D. 142; 52 L. J. Q. B. 127.

(*d*) *Morritt* v. *North Eastern Railway Co.*, 1 Q. B. D. 302; 45 L. J. Q. B. 289; 34 L. T. 940.

liability for loss or injury arising from the felonious acts of his servants, or to protect his servants from liability for their own personal neglect or misconduct (*e*). It applies, in the case of railways, to ordinary personal luggage which the passenger is entitled to have carried free of charge, and, therefore, where such luggage consists of valuable articles within the Act, the railway is protected unless the value is declared and an increased charge is paid (*f*). Even when the value of goods has been declared, the carrier is not bound by the declaration, but, in case of its loss or injury, he is entitled to require proof of its actual value, and he is only liable to the extent of its value together with the increased charges paid (*g*).

Where goods are carried partly by land and partly by sea the Act protects the carrier only when the goods are lost on land, and the onus is on the carrier to prove that the loss occurred during the land journey (*h*).

By s. 7 of the *Railway and Canal Traffic Act*, 1854 (*i*), no railway or canal company is liable for loss or injury to animals beyond the sum of £50 for horses, £15 for neat cattle, and £2 for sheep or pigs, per head, unless a higher value is declared and an increased rate, which must be notified as under the Carriers Act, 1830, has been paid or agreed to be paid.

Limitation of liability by special contract.—A common carrier might at Common Law limit his liability by making a special contract with the consignor of goods. Before the Carriers Act, 1830, this was often effected by means of conditions publicly exhibited at receiving offices or placed upon tickets and receipts, for it was held that such conditions, if sufficiently brought to the notice of the consignor before he sent the goods, could operate as a special contract limiting the liability of the consignor (*k*).

(*e*) S. 7. As to special contracts against such acts, see *post*, p. 313.

(*f*) *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K. B. 499; 76 L. J. K. B. 734. A regulation that a certain quantity of luggage will be carried "free of charge" means that the fare is a charge for the conveyance both of the passenger and his luggage ([1907] 2 K. B., at p. 506).

(*g*) Ss. 7 and 8.

(*h*) *London and North Western Railway Co.* v. *J. P. Ashton & Co.*, [1920] A. C. 84; 88 L. J. K. B. 1157; 122 L. T. 75; 35 T. L. R. 708.

(*i*) 17 & 18 Vict. c. 31. Under the Railways Act, 1921, the amounts are £100 for horses, £50 for neat cattle, and £5 for any other animal.

(*k*) *Ante*, p. 37. See also the opinion of Blackburn, J., in *Peek* v. *North Staffordshire Railway Co.*, 10 H. L., at p. 491; 32 L. J. Q. B. 241; 138 R. R.

But by the Carriers Act, 1830, which applies only to carriers by land, it was enacted that no *public* notice or declaration should have any effect (*l*), though it was at the same time provided that nothing in the Act should affect any special contract made between the carrier and the sender of goods (*m*). Accordingly, though after this Act the carrier could not limit his liability by a public notice, he could still do so by any "notice specifically delivered to a particular person to form the basis of a special contract with him" (*n*), as, for example, by a condition printed on a ticket (*o*).

Such a special contract can still be made by any common carrier, *other than a railway or canal company*. But, by s. 7 of the *Railway and Canal Traffic Act*, 1854, it is provided that every railway or canal company shall be liable for the loss of or injury done to any animals or goods, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, and that any notice or condition to the contrary shall be absolutely void, provided, however, that nothing shall alter or affect the rights, privileges, or liabilities of any such company under the Carriers Act, 1830, with respect to articles of the description mentioned in that Act. The section, however, also provides that nothing therein contained is to prevent a railway or canal company from making such conditions with respect to the receiving, forwarding, and delivering of animals or goods as shall be adjudged by the Court or Judge, before whom any question relating thereto shall be tried, to be just and reasonable, and that no special contract with such a company as to the receiving, forwarding, or delivering of any animals or goods shall be binding upon anyone unless signed by him or the person delivering the animals or goods for carriage. All the words of this section must be read together, and, therefore, the conditions there spoken of must not only be just and reasonable, but must also be embodied in a special contract in writing.

250; in which the history of this subject is stated, and the previous authorities are reviewed.

(*l*) S. 4.

(*m*) S. 6.

(*n*) *Walker* v. *York and North Midland Railway Co.*, 2 E. & B., at p. 761; and see 10 H. L., at p. 507.

(*o*) See cases cited in 10 H. L., at pp. 499—505

signed by the owner or sender of the goods (*p*). The question as to what constitutes a reasonable condition is a question of fact, depending on the circumstances of each case; and the burden of proving that the condition is reasonable rests upon the railway company who allege it (*q*). Railway companies usually carry either "at company's risk" or "at owner's risk," and if a consignor has a fair alternative between sending at the company's risk for a reasonable sum, or sending at his own risk for a smaller sum, and chooses the latter, a condition against liability, except for wilful default or neglect, is usually held to be reasonable (*r*).

The section applies to all goods received under a contract of carriage, and is not limited to goods which the company is bound to carry in the particular class of conveyance in which they are carried. It applies, therefore, to goods carried by passenger train which the company is only under a legal obligation to carry by goods train, and any condition which limits the liability of the railway company in such circumstances is void unless a special contract is signed (*s*).

The words "neglect or default" in the earlier part of the section extend only to negligence or default in the nature of negligence or within the scope of the servants' employment; they do not include theft by a servant without any negligence on the part of the company, and, therefore, subject, in case of the valuables specified in the Act of 1830, to the provisions of s. 8 of that statute, a railway company can at Common Law make a special contract exempting itself from liability for theft;

(*p*) *Peek* v. *North Staffordshire Railway Co.*, 10 H. L. 443; 32 L. J. Q. B. 241; 138 R. R. 250; affirming *Simons* v. *Great Western Railway Co.*, 18 C. B. 805; 26 L. J. C. P. 25; 107 R. R. 525.

(*q*) *Peek* v. *North Staffordshire Railway Co.* (*ubi supra*); *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown*, 8 A. C., at p. 716; 53 L. J. Q. B. 124; 50 L. T. 281. See, however, the Railways Act, 1921, *post*, p. 317.

(*r*) *Manchester, etc., Railway Co.* v. *Brown* (*ubi supra*); *Joshua Buckton & Co.* v. *London and North Western Railway Co.*, 117 L. T. 556; 34 T. L. R. 119; 87 L. J. K. B. 234. But a condition against all liability is unreasonable (*Peek* v. *North Staffordshire Railway Co.* (*ubi supra*); *Ashenden* v. *London, Brighton and South Coast Railway*, 5 Ex. D.). As to when different rates offer a fair alternative, compare *Dickson* v. *Great Northern Railway Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111; 55 L. T. 868, with *Williams* v. *Midland Railway Co.*, [1908] 1 K. B. 252; 77 L. J. K. B. 157.

(*s*) *Wilkinson* v. *Lancashire and Yorkshire Railway*, [1906] 2 K. B. 169; 76 L. J. K. B. 801; 94 L. T. 820; 23 T. L. R. 509.

and such a contract, not being within the Act of 1854, need not be just and reasonable as required by that Act (*t*).

The Act of 1854 does not apply to contracts made by railway companies exempting themselves from liability for loss or detention occurring beyond their own lines (*u*). But by s. 12 of the *Railways Regulation Act*, 1871 (*x*), it is provided that, where any railway company, under a contract for carrying persons, animals, or goods by sea, procures the same to be carried in a vessel not belonging to the railway company, its liability is to be the same as if the vessel had belonged to the company.

The *Railways Regulation Act*, 1868, provides that, where a company by through booking contracts to carry animals, luggage, or goods partly by rail or canal and partly by sea, a condition exempting it from liability for any loss or damage arising by sea from the act of God, the King's enemies, fire, accidents from machinery, boilers and steam, and all other dangers or accidents of the seas, rivers, and navigation shall, if published in a conspicuous manner in the office where the booking is effected and printed legibly on the receipt or freight-note, be valid as part of the contract between the consignor and the company (*y*).

By the *Railway and Canal Traffic Act*, 1854 (*z*), every railway and canal company is bound to afford reasonable facilities for receiving and forwarding traffic, *i.e.*, passengers and their luggage, goods, animals, and carriages, trucks, boats, and vehicles of every description adapted for running or passing on its railway or canal (*a*).

Therefore, besides goods which such a company undertakes to carry as a common carrier, it must also provide for other "traffic." But, as already stated, it only has the liability of a common carrier in respect of goods which it professes to carry as such; and in respect of other "traffic" it is liable only as an

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(*t*) *Shaw* v. *Great Western Railway Co.*, [1894] 1 Q. B. 373; 70 L. T. 218.

(*u*) *Zunz* v. *South Eastern Railway Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*x*) 34 & 35 Vict. c. 78. See *Doolan* v. *Midland Railway Co.*, 2 A. C. 792.

(*y*) 31 & 32 Vict. c. 119, s. 14. The section does not apply to a passenger travelling with a free pass (*The Stella*, [1900] P. 162; 69 L. J. P. 70; 82 L. T. 399).

(*z*) 17 & 18 Vict. c. 31, s. 2.

(*a*) *Id.*, s. 1.

ordinary bailee for the neglect or default of its servants (*b*), and its liability may be further limited by a special contract under s. 7 of the Act.

Railway companies are common carriers of passengers' luggage received by them for transit, from the time when it is delivered to them for the purposes of the journey until the time when it is redelivered by them to the passenger at the termination of the journey: if, however, at the instance or request of the passenger the luggage is not put into the van, but into a carriage, to be carried with the passenger, the railway company is not liable for any loss or injury occasioned by the passenger's own act or default while the luggage is within his control and out of the exclusive control of the company (*c*).

The liability of the railway company as a common carrier does not attach to luggage delivered for deposit or future transit, but only to luggage received for present transit, *i.e.*, received a reasonable time before the departure of the train, so that it can be reasonably predicated of the passenger to whom it belongs that he is actually prosecuting his journey by rail and not merely waiting to begin its prosecution at some future time (*d*).

At the end of the journey it is the duty of the railway company to have the luggage ready for delivery upon the platform, and it is the owner's duty to call for it and remove it within a reasonable time; and if he does not take it away within a reasonable time the liability of the company is at an end (*e*). But if the company employs porters to carry the luggage from the platform to the cart or other vehicle in which it is to be taken away, their liability as common carriers continues until the porters have discharged their duty (*f*). If luggage is left in the custody of a porter under such circumstances as to make the porter the agent of the

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(*b*) *Dickson* v. *Great Northern Railway Co.*, 18 Q. B. D. 176; 56 L. J. Q. B. 111; *Smith & Sons* v. *London and North Western Railway Co.*, 88 L. J. K. B. 742; 120 L. T. 273.

(*c*) *Great Western Railway Co.* v. *Bunch*, 13 A. C. 31; 57 L. J. Q. B. 361; 58 L. T. 128; reviewing the earlier authorities and affirming *Richards* v. *London, Brighton and South Coast Railway Co.*, 7 C. B. 839; 18 L. J. C. P. 251; 78 R. R. 840; and *Talley* v. *Great Western Railway Co.*, L. R. 6 C. P. 44; 40 L. J. C. P. 9.

(*d*) 13 A. C., at pp. 41, 45.

(*e*) *Patscheider* v. *Great Western Railway Co.*, 3 Ex. D. 153; 38 L. T. 149.

(*f*) *Richards* v. *London, Brighton and South Coast Railway Co.*, 7 C. B. 839. See also *Butcher* v. *London and South Western Railway Co.*, 16 C. B. 13.

passenger, the company is under no liability. Thus, where a passenger, having missed his train, left his luggage on the platform in the charge of a porter, saying that he would travel by the next train, which went in an hour, and in the interval went to an hotel, it was held that the company was not liable for its loss during his absence (*g*). So also where a passenger, having at the end of the journey received her luggage from the company, entrusted it to a porter to take care of until she could send for it, the company was held not to be liable for its loss (*h*).

Passengers' luggage consists of "whatever the passenger takes with him for his personal use and convenience, according to the habits or wants of the particular class to which he belongs, either with reference to his immediate necessities, or to the ultimate purpose of the journey." . . . "This would include, not only all articles of apparel, whether for use or ornament—leaving the carrier herein to the protection of the Carriers Act . . . —but also the gun-case or the fishing apparatus of the sportsman, the easel of the artist on a sketching tour, or the books of the student, and other articles of an analogous character, the use of which is personal to the traveller, and the taking of which has arisen from the fact of his travelling" (*i*).

If articles are deposited in the cloak-room of a railway company the liability of a company is merely that of a bailee (*k*), subject to any special contract limiting their liability (*l*); and any

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(*g*) *Welsh* v. *London and North Western Railway Co.*, 34 W. R. 166.

(*h*) *Hodkinson* v. *London and North Western Railway Co.*, 14 Q. B. D. 228; 33 W. R. 622.

(*i*) *Macrow* v. *Great Western Railway Co.*, L. R. 6 Q. B., at p. 621; 40 L. J. Q. B. 300; cited and approved in *Casswell* v. *Cheshire Lines Committee*, [1907] 2 K. B., at p. 504; 76 L. J. K. B. 734. Passengers' luggage does not include a child's toy horse weighing 78 lbs. (*Hudston* v. *Midland Railway Co.*, L. R. 4 Q. B. 366; 38 L. J. Q. B. 213), nor a client's title deeds carried by a solicitor (*Phelps* v. *London and North Western Railway Co.*, 19 C. B. (N.S.) 321; 34 L. J. C. P. 259), nor bedding brought by an immigrant from Canada for the use of his family when he acquires a home in England (*Macrow* v. *Great Western Railway Co.*, *ubi supra*). A bicycle is not "ordinary" luggage within the meaning of a Railway Act allowing "ordinary" luggage of a certain weight to be carried free of charge (*Britten* v. *Great Northern Railway*, [1899] 1 Q. B. 243; 68 L. J. Q. B. 75; 79 L. T. 640).

(*k*) See *Harris* v. *Great Western Railway Co.*, 1 Q. B. D., at p. 528; 45 L. J. Q. B. 729. The bailment is *locatio operis faciendi*.

(*l*) See *Van Toll* v. *South Eastern Railway Co.*, 12 C. B. (N.S.) 75; 31 L. J. C. P. 241; 133 R. R. 285; *Pratt* v. *South Eastern Railway Co.*, [1897] 1 Q. B. 718; 66 L. J. Q. B. 418.

such special contract is not void merely because the conditions are unreasonable, though it may be void if the conditions are so extravagant as to imply that the assent of the depositor has been obtained by fraud, or so irrelevant as to be entirely foreign to the contract (*m*).

Equality of Charges.—By various statutes, which are outside the scope of this work, railway companies are bound to make equal charges to all persons in respect of the carriage of goods and to give no undue preference to any particular persons or descriptions of traffic. By the *Railway and Canal Traffic Act*, 1888, a new Court of Record, called "The Railway and Canal Commission," was established with jurisdiction over charges and various other matters. By the *Railways Act*, 1921, the railways of Great Britain have been amalgamated into groups, and a Court of Record, styled the Railway Rates Tribunal, has been created with jurisdiction over charges and certain other matters, such jurisdiction ceasing to be exercisable by the Railway and Canal Commission. Schedules of charges were to be submitted by the railways to the Tribunal before 1923, and, when approved, will come into force on an "appointed day" from which day all statutory provisions and agreements with respect to charges will, with some exceptions, come to an end. The railways were also within six months after the Act, or such further time as may be allowed to submit their "company's risk" and "owner's risk" conditions of carriage, which, when settled by the Tribunal, will be the standard conditions and *shall be deemed reasonable*. From the "appointed day" the Carriers Act, 1830, and the Railway and Canal Traffic Act, 1854, will be modified in their application to railway companies.

Contracts of Affreightment are contracts for the carriage of goods by sea for a reward termed *freight*. Such a contract is usually, but not necessarily, in one of two following forms:—

1. It may be made between a shipowner and a person who hires the ship or some definite part of the ship for the conveyance of goods on a specific voyage or for a specified time. In this case

(*m*) *Gibaud* v. *Great Eastern Railway Co.*, [1921] 2 K. B. 427; 90 L. J. K. B. 535; 125 L. T. 76; 37 T. L. R. 422.

the person hiring the ship is termed the *charterer*, and the contract is contained in a *charterparty*.

2. It may be made between a shipowner or a charterer and one of a number of persons who deliver goods to be carried in the ship. Here the ship is called a *general ship* and the contract is evidenced by a *bill of lading*. But even when a ship is chartered and employed by the charterer only for his own goods it is usual for him to receive a bill of lading, which serves as a receipt for the goods and as a document of title (*n*).

Charterparties.—A charterparty may be of two kinds. It may operate as a demise of the ship itself, to which the services of the master and crew may or may not be added, or the charterer may merely acquire the right to have his goods conveyed by the particular vessel and, as subsidiary thereto, to have the use of the vessel and the services of the master and crew. " In the first case, the charterer becomes for the time the owner of the vessel, the master and the crew become to all intents and purposes his servants, and through them the possession of the ship is in him. In the second, notwithstanding the temporary right of the charterer to have his goods loaded and conveyed in the vessel, the ownership remains in the original owners, and through the master and the crew, who continue to be their servants, the possession of the ship also " (*o*). It is very rarely that a charterparty does amount to a demise of the ship (*p*), and unless otherwise stated the remaining part of this section applies only to the latter kind of charterparty and only to a voyage charter.

Where a ship is chartered and used by the charterer as a general ship the question with whom the shipper has contracted depends upon the circumstances of the case. If the charterparty is a demise the contract under the bill of lading is between the

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(*n*) See *Oriental S.S. Co.* v. *Tylor*, [1893] 2 Q. B., at p. 521; 63 L. J. Q. B. 128; 69 L. T. 577; *Kruger & Co., Ltd.* v. *Moel Tryvan Ship Co., Ltd.*, [1907] A. C. 272; 76 L. J. K. B. 985; 97 L. T. 143; 23 T. L. R. 677.

(*o*) *Sandeman* v. *Scurr*, L. R. 2 Q. B., at p. 96; 36 L. J. Q. B. 58; 15 L. T. 608. See also *Baumwoll* v. *Gilchrist*, [1892] 1 Q. B. 253; affirmed *sub nom. Baumwoll* v. *Furness*, [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; *Associated, etc., Cement Co.* v. *Ashton*, [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486.

(*p*) For an example, see *Elliott Steam Tug Co.* v. *Admiralty Commissioners*, [1921] 1 A. C. 137; 89 L. J. K. B. 977; 123 L. T. 754.

shipper and the charterer (*q*). If the charterparty is not a demise the presumption is that the contract under the bill of lading is between the shipper and the owner (*r*). This presumption may be rebutted by showing that the contract was in fact made with the charterer (*s*); but it is not rebutted by the fact that the charterparty contains a clause providing that the master, in signing bills of sale, shall do so as agent for the charterer, unless it is proved that the shipper not only knew of the charterparty but also had actual knowledge of its terms (*t*).

Form of Charterparty.—The following is a short form of charterparty in use in the port of Bristol:—

"*Charterparty.*

"It is this day mutually agreed between of the good Ship or Vessel called the of the Burthen of Tons Register, carrying Tons or thereabouts exclusive of bunkers now and that the said Ship being tight, staunch and strong, and every way fitted for the voyage, shall with all convenient speed, sail and proceed to or so near thereunto as she may safely get and there load from the Agents of the said Charterers, in the usual and customary manner, a full and complete cargo of the hold of the Vessel to be thoroughly cleaned before loading. The cargo to be brought to and taken from alongside the Ship at Merchants' risk and expense. Which cargo the said Merchants bind to ship, and not exceeding what she can reasonably stow and carry over and above her Tackle, Apparel, Provisions and Furniture: and being so loaded shall therewith proceed with all convenient speed to or so near thereunto as she may safely get, and there deliver the same, on being paid freight, at the rate of per ton of

(*q*) *Baumwoll* v. *Furness (ubi supra); Samuel, Samuel & Co.* v. *West Hartlepool Steam Navigation Co.*, 11 Com. Cas. 115.

(*r*) *Sandeman* v. *Scurr*, L. R. 2 Q. B., at pp. 97, 98; 36 L. J. Q. B. 58; 15 L. T. 608; *Manchester Trust* v. *Furness*, [1895] 2 Q. B., at p. 543, 64 L. J. Q. B. 766; 11 T. L. R. 530; *Wehner* v. *Dene S.S. Co.*, [1905] 2 K. B., at p. 98; 74 L. J. K. B. 550; 21 T. L. R. 309; *Associated, etc. Cement Co.* v. *Ashton (ubi supra)*.

(*s*) See, *e.g.*, *Marquand* v. *Banner*, 6 E. & B. 232; 25 L. J. Q. B. 313; *Harrison* v. *Huddersfield S.S. Co.*, 19 T. L. R. 386; *Samuel, Samuel & Co.* v. *West Hartlepool, etc., Co. (ubi supra)*.

(*t*) *Manchester Trust* v. *Furness*, [1895] 2 Q. B. 539; 64 L. J. Q. B. 766; 11 T. L. R. 530.

20 cwt. delivered. It is agreed that the following additional exceptions and conditions shall apply to this contract;—The Act of God, Perils of the Sea, Fire on board in hulk or craft, or on shore, Barratry of the Master and Crew, Enemies, Pirates and Thieves, arrests and restraint of Princes, Rulers and People, Collisions, Stranding, and other Accidents of Navigation excepted, even when occasioned by negligence, default or error in judgment of the Pilot, Master, Mariners, Agents or other Servants of the Shipowners. Not answerable for any loss or damage arising from Explosion, Bursting of Boilers, Breakage of Shafts, or any latent defects in Machinery or Hull. The Ship has liberty to call at any ports in any order, to sail without Pilots, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. Salvage and/or towage services for Owners' sole benefit. Sufficient cash to be advanced at port of loading for Ship's disbursements to the extent of £ subject to insurance, and the balance on delivery of Cargo in Cash at current rate of exchange. The Master to receive gratuity. Ship not to be held responsible for cost of cargo short delivered (if any) notwithstanding the Master may have signed a receipt for weight, all cargo taken on board to be delivered, Captain or Mate making affidavit to this effect if required. Bills of Lading are to be signed, if required without prejudice to this Charter Party (*u*).

" Vessel to be loaded .

" The cargo to be stowed and trimmed by and discharged at the risk and expense of . Ship to give use of winch and winchman if required.

" (Sundays, holidays, strikes, lock-outs, and combination of workmen mutually excepted.)

" (Saturdays and half-days to count as such.)

" Demurrage over and above the said Laying Time.

" The owner to have an absolute lien on the Cargo for all Freight, Dead Freight, and Demurrage.

(*u*) The effect of this clause is that it is a term of the contract between the charterer and the shipowner that, notwithstanding anything contained in the bills of lading, that contract shall remain unaltered, and the rights of the shipowners against the charterers and *vice versa* are to be preserved (see *Turner* v. *Haji Goolam Mahomed Azam*, [1904] A. C., at p. 837; 74 L. J. P. C. 17; *Kruger & Co., Ltd.* v. *Moel Tryvan Ship Co., Ltd.*, [1907] A. C. 272; 76 L. J. K. B. 985; 97 L. T. 143; 23 T. L. R. 677).

" General average (if any) as per York Antwerp Rules 1924.

" The owners in all matters arising under this contract shall also be entitled to the like privileges and rights and immunities as are contained in Sections 2 and 5 of The Carriage of Goods by Sea Act, 1924, and in Article IV of the Schedule thereto.

" 5 per cent. commission is due by the Ship on the amount of Freight, Primage and Demurrage to [*the brokers*] (ship lost or not lost) with whom the Ship is to be reported on her next return to Bristol, and by his Agents at port of discharge, under a Penalty of Five Pounds. Penalty for Non-performance of this Agreement—Estimated amount of Freight as liquidated damages."

The discussion of the terms of a charterparty is beyond the scope of this work, but the following points may be noted:—

Whether any statement or undertaking in a charterparty is a condition or a warranty is a question of construction, in which the Court will be influenced, not only by the language of the instrument, but by the circumstances in which, and the purposes for which the charterparty was entered into (*x*). The test is how far the object of the contract depends upon it (*y*). Thus, in ordinary circumstances, a statement of the ship's position at the date of the charterparty is a condition, as being the datum on which the charterer can found his calculation of the time of the ship's arrival at the port of loading (*z*); so also a statement that a vessel is to sail or be ready to receive a cargo, on or before a given day, has been held to be a condition (*a*); but a statement that a ship is " tight, staunch and strong," or a stipulation that a ship shall " forthwith " or " with all possible despatch " proceed

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(*x*) *Behn* v. *Burness*, 3 B. & S., at p. 757; 32 L. J. Q. B. 204; 8 L. T. 207; 124 R. R. 794.

(*y*) 3 B. & S., at p. 759; see also *ante*, p. 186.

(*z*) *Ibid.* Where the ship, when chartered, is not at the place of loading, the chartered voyage includes both the preliminary voyage to the place of loading and the carrying voyage (see *Nelson* v. *Dahl*, 12 Ch. D., at pp. 580, 581).

(*a*) 3 B. & S., at p. 754. The same effect is produced by the *cancellation clause*, which is frequently contained in charterparties, by which the charterer has the option of cancelling the charter if the ship is not ready to load by a certain date.

to the port of loading will be construed as a warranty unless the breach is so serious as to frustrate the object of the contract (*b*).

It is, however, an implied condition of the charterparty that the ship shall arrive at the port of loading in time for the contemplated voyage, and if the delay is so great as to frustrate the object of the voyage the charterer may throw up the charterparty (*c*). So also it is an implied condition that the ship is fit to receive the goods, and to encounter the ordinary perils likely to arise during the loading stage (*d*); and if she is not fit, and cannot be made fit, within a reasonable time, the charterer may throw up the charterparty (*e*).

The obligation of the charterer to provide the cargo begins as soon as the ship is at the place of loading contemplated by the charterparty, and is ready to receive the goods on board, and the charterer has notice thereof (*f*).

The charterer is under an absolute obligation to provide the cargo specified by the charterparty; and, therefore, subject to any express stipulations and save in the special classes of cases in which impossibility of performance is a defence (*g*), he is not excused by anything which prevents him from so doing, as, *e.g.*, inability to procure the particular cargo, or adverse weather, or

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(*b*) *Tarrabochia* v. *Hickie*, 1 H. & N. 183; 26 L. J. Ex. 26; 108 R. R. 508; *MacAndrew* v. *Chapple*, L. R. 1 C. P. 643; 14 L. T. 556; *Jackson* v. *Union Marine Insurance*, L. R. 10 C. P. 125; 42 L. J. C. P. 284. An express statement in the charterparty that the ship is "tight, staunch and strong" must be distinguished from the implied condition of seaworthiness which will be mentioned later.

(*c*) *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125; 42 L. J. C. P. 284. The shipowner will also be liable in damages unless the delay is due to an excepted peril (*Barker* v. *M'Andrew*, 18 C. B. (N.S.) 759; 34 L. J. C. P. 191; 144 R. R. 657).

(*d*) *McFadden* v. *Blue Star Line*, [1905] 1 K. B., at p. 704; 74 L. J. K. B. 423; 93 L. T. 52; 21 T. L. R. 345.

(*e*) *Stanton* v. *Richardson*, L. R. 9 C. P. 390; 45 L. J. C. P. 78; 33 L. T. 193; *Tully* v. *Howling*, 2 Q. B. D. 182; 46 L. J. Q. B. 388; 36 L. T. 63.

(*f*) *Nelson* v. *Dahl*, 12 Ch. D., at p. 583; *United States Shipping Board* v. *Frank Strick & Co.*, [1926] A. C., at p. 558; 95 L. J. K. B. 776; 135 L. T. 185; 42 T. L. R. 556. Where the ship is to proceed to a certain port "or so near thereto as she may safely get," the first of these alternatives constitutes the primary obligation, and the ship must proceed to that port unless it has become in some sense impossible to do so by reason of an obstacle which is not merely temporary (*Dahl* v. *Nelson*, 6 A. C. 38; 50 L. J. Ch. 411; 44 L. T. 381).

(*g*) *Ante*, p. 172.

strikes (*h*). If he fails to provide a "full and complete" cargo (*i*), he is liable to pay compensation, termed *dead freight* (*k*).

If no specific time is fixed within which the ship is to be loaded, the charterer must load within a time which is reasonable, having regard to the existing circumstances (*l*) and to any express term of the charterparty, as, *e.g.*, a provision that it shall be loaded "with all possible despatch" or with the customary dispatch of the port (*m*). Usually, however, there is a provision that a fixed number of days, termed *lay days*, shall be allowed for loading and a further provision providing for an additional daily payment, known as *demurrage*, for detention beyond the agreed lay days, this further stipulation either giving the charterer the right to detain the ship for a specified number of days on payment of demurrage or merely providing that demurrage shall be paid at a fixed daily rate after the expiration of the lay days. Where the number of lay days is definitely fixed the charterer is under an absolute obligation to complete the loading within the lay days, and on failure to do so is liable for demurrage and for damages for the further detention of the ship beyond the demurrage days, even though completion of the loading is rendered impossible without any fault on his part, unless either there is an express stipulation to the contrary in the charterparty or the failure to load within the time specified arose from the fault of the shipowners or those for whom they are responsible (*n*). Where, however, the stipulation is merely that demurrage at an agreed rate shall be paid after the expiration of the lay days, the shipowner cannot, however long the ship is detained, claim

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(*h*) See *Coverdale* v. *Grant*, 9 A. C. 470; 53 L. J. Q. B. 462; 51 L. T. 572; *Ardan S.S. Co.* v. *Weir*, [1905] A. C. 501; 74 L. J. P. C. 143; 93 L. T. 559.

(*i*) That is to say, a "full and complete cargo" of the thing which was contemplated to be loaded by the charterparty (*Isis S.S. Co.* v. *Barr*, [1900] A. C., at p. 344; 69 L. J. Q. B. 660; 82 L. T. 571).

(*k*) *McLean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317; *Kish* v. *Taylor*, [1912] A. C. 604; 81 L. J. K. B. 1027; 106 L. T. 900; 28 T. L. R. 425.

(*l*) Thus in this case he may be excused if the delay is due to a strike (*Hick* v. *Raymond*, [1893] A. C. 22; 62 L. J. Q. B. 98; 9 T. L. R. 141).

(*m*) *Nelson* v. *Dahl*, 12 Ch. D., at p. 583.

(*n*) *Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa*, [1920] A. C. 88; 88 L. J. P. C. 182; 122 L. T. 1; 35 T. L. R. 709; *United States Shipping Board* v. *Frank Strick*, [1926] A. C., at pp. 558, 559; 95 L. J. K. B. 776; 135 L. T. 185; 42 T. L. R. 556.

damages for detention, but can only claim compensation for the delay at the demurrage rate (*o*). But in any case the sum named as demurrage merely quantifies such damages as arise from the detention of the vessel and does not prevent the shipowner from recovering damages for any other breach of contract as, *e.g.*, failure to load a full and complete cargo (*p*).

The obligation of the charterer to unload arises as soon as the ship has reached the place where the carrying voyage is to end and is ready to unload, and in the absence of special agreement the shipowner is not bound to give notice that the ship has arrived and is ready to unload: in other respects the rights and liabilities of the shipowner and charterer with respect to unloading are substantially the same as with respect to loading (*q*).

Form of bill of lading:—

SHIPPED in good order and condition, by —— in and upon the good Ship called the ——, —— Master, now in the Port of —— and bound for ——

being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid Port of —— (The Act of God, Perils by the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Thieves, Arrest and Restraint of Princes, Rulers and People, Collisions, Stranding, and other Accidents of Navigation excepted, even when occasioned by the Negligence, Default or Error in Judgment of the Pilot, Master, Mariners, or other Servants of the Shipowner) unto —— or to —— Assigns: he or they paying freight for the said Goods, at —— per ton of 20 cwt. delivered, with —— gratuity and all other conditions and exceptions as per Charter Party, dated —— with Primage and Average accustomed (*r*). From the time at which the goods are received on the ship's tackles to the time

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(*o*) *Inverkip S.S. Co.* v. *Bunge & Co.*, [1917] 2 K. B. 193; 86 L. J. K. B. 1042; 117 L. T. 102; 30 T. L. R. 492.

(*p*) *Aktieselskabet Reidar* v. *Arcos, Ltd.*, [1927] 1 K. B. 353; 96 L. J. K. B. 33. The charterer has committed a breach of contract as soon as the lay days expire without a full cargo being loaded (*id.*).

(*q*) *Nelson* v. *Dahl*, 12 Ch. D., at p. 583.

(*r*) "Primage" is a small payment to the master; "average" in this case means certain expenses which are borne partly by the ship and partly by the cargo.

at which they are discharged therefrom, all the terms, provisions and conditions of the Carriage of Goods by Sea Act, 1924, and the schedule thereto are to apply to the contract contained in this Bill of Lading, and the carriers are to be entitled to the benefit of all privileges, rights and immunities contained in such Act and the schedule thereto, as if the same were herein specifically set out. If, or to the extent that, any term of this Bill of Lading is repugnant to, or inconsistent with, any thing in such Act or schedule it shall be void. In witness whereof the Master or Agent of the said Ship hath affirmed to —— Bills of Lading (*s*), all of this tenor and date, the one of which Bills being accomplished, the others to stand void. Dated in —— the —— day of ——. (Signed) —— (*t*).

A bill of lading has three functions:—

1. It is a *receipt* for the goods and *prima facie* evidence that goods of that kind and amount were shipped (*u*), subject to any statements therein such as "weight, measurement, contents and value unknown" (*x*). The master of a ship has no authority to sign bills of lading for goods that were never shipped (*y*): but by *s.* 3 of the *Bills of Lading Act*, 1855, it is also, in the hands of a consignee or indorsee for value, conclusive evidence of such shipment as against the master or other person signing it, notwithstanding that the goods or some part thereof may not have been actually shipped, unless such holder of the bill of lading had actual notice of this fact at the time when he received it. But the master or person signing may exonerate himself by showing that the mistake was caused without any default on his part and wholly

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(*s*) Bills of lading are generally drawn in a set consisting of three parts, each being in itself a complete bill; of these one is retained by the master, one is retained by the shipper, and one is sent by post to the consignee, who can then, since it is a document of title, deal with the goods though they have not yet arrived (*post*, p. 327).

(*t*) The bill of lading is signed by the master (or the broker). It is usually preceded by a mate's receipt, upon the giving of which the master becomes the bailee of the goods (*The Okehampton*, [1913] P., at p. 178; 83 L. J. P. 5; 110 L. T. 130).

(*u*) *Smith & Co.* v. *Bedouin Steam Navigation Co.*, [1896] A. C. 70; 65 L. J. P. C. 8; 12 T. L. R. 65.

(*x*) *New Chinese, etc., Co., Ltd.* v. *Ocean S.S. Co., Ltd.*, [1917] 2 K. B. 664; 86 L. J. K. B. 1417; 117 L. T. 297.

(*y*) *Grant* v. *Norway*, 10 C. B. 665; 20 L. J. C. P. 931.

by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

2. It is, except as between a shipowner and a charterer, *evidence of the terms of the contract* made by the person shipping the goods (*z*).

As between a shipowner and a charterer the contract is in the charterparty, and that contract is not affected by anything contained in a bill of lading given to the charterer (*a*), unless either the charterparty expressly refers to and incorporates part of the bill of lading (*b*) or the bill of lading expressly refers to and varies the charterparty (*c*). As regards all other persons, *i.e.*, a shipper who is not a charterer or a consignee or indorsee of the bill of lading, the contract is in the bill of lading, which may, however, expressly refer to and so incorporate part of the charterparty (*d*). But references in a bill of lading to a charterparty will be construed strictly; thus a reference to the "conditions" of a charterparty will not include the "exceptions" and will moreover only incorporate those clauses which relate to the conditions to be performed by the receiver of the goods and which are not inconsistent with or inapplicable to the bill of lading (*e*). The shipowner is as a general rule bound by any bill of lading which it is within the usual authority of a master to sign (*f*), but the holder of a bill of lading who has notice that the bill of lading is one which the master ought not to have signed because it was not in

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(*z*) *Sewell* v. *Burdick*, 10 A. C. 54; 54 L. J. Q. B. 156; 52 L. T. 445. As between the shipowner and an indorsee it is the sole evidence (*Leduc* v. *Ward*, 20 Q. B. D. 475; 57 L. J. Q. B. 379; 58 L. T. 908).

(*a*) *Leduc* v. *Ward* (*ubi supra*); *Temperley S.S. Co.* v. *Smyth*, [1905] 2 K. B., at p. 802; 74 L. J. K. B. 876; 93 L. T. 471; 21 T. L. R. 739.

(*b*) *Chappel* v. *Comfort*, 10 C. B (N.S.) 802; 31 L. J. C. P. 58; 4 L. T. 448; *Fry* v. *Mercantile Bank of India*, L. R. 1 C. P. 68; 35 L. J. C. P. 306; 14 L. T. 709; *Manchester Trust* v. *Furness* (*ubi supra*); *Oriental S.S. Co.* v. *Tylor*, [1893] 2 Q. B. 518; 63 L. J. Q. B. 128; 69 L. T. 577.

(*c*) *Rodocanachi* v. *Milburn*, L. R. 9 C. P. 518; 43 L. J. C. P. 255; 31 L. T. 239.

(*d*) *Temperley S.S. Co.* v. *Smyth* (*ubi supra*); *The Draupner*, [1909] P., at p. 230; 78 L. J. P. 90; 25 T. L. R. 438; reversed on facts, [1910] A. C. 450; see also *Manchester Trust* v. *Furness* (*ubi supra*).

(*e*) *Porteous* v. *Watney*, 3 Q. B. D. 534; 47 L. J. Q. B. 367; 39 L. T. 195; *Serraino* v. *Campbell*, [1891] 1 Q. B. 283; 60 L. J. Q. B. 303; 64 L. T. 615; *Temperley S.S. Co.* v. *Smyth* (*ubi supra*); *Thomas & Co., Ltd.* v. *Portsea S.S. Co.*, [1912] A. C. 1; 105 L. T. 257; 81 L. J. P. 17.

(*f*) See *Compania Naviera* (*Vascongada*) v. *Churchill*, [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59; 22 T. L. R. 85.

accordance with the charterparty cannot enforce it against the shipowner (*g*).

A *through* bill of lading is one given for goods whose transit will be in different stages, *i.e.*, by the vessels of more than one shipowner, or partly by sea and partly by land. The liabilities of the different carriers in such a case have already been noted (*h*).

3. It is a *document of title* to the goods.

Goods shipped under a bill of lading are usually deliverable to the shipper or consignee or his "order" or "assigns." Bills of lading containing these words (*i*) are transferable by indorsement and delivery, which transfers such property in the goods as was intended to be transferred, *i.e.*, either the general property, or, as in the case of a mortgage or pledge, the special property (*k*). And by *s.* 1 of the *Bills of Lading Act*, 1855, "every consignee of goods named in a bill of lading, and every *indorsee* of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities, in respect of such goods as if the contract contained in the bill of lading had been made with himself." But this section applies only when the *property* passes so that a person to whom a bill of lading is transferred by way of pledge for a loan does not thereby become liable for freight (*l*). And by s. 2 of the Act it is provided that nothing therein shall prejudice or affect any right of stoppage *in transitu* or any right to claim freight against the original shipper or owner.

But a bill of lading is not a negotiable instrument and, save as against stoppage *in transitu* (*m*) or in cases within the Factors Act (*n*), it gives an assignee no greater right to the goods than

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(*g*) *Turner* v. *Haji Goolam Mahomed Azam*, [1904] A. C., at p. 826; 74 L. J. P. C. 17; 91 L. T. 216; 20 T. L. R. 599.

(*h*) *Ante*, p. 309.

(*i*) *Henderson* v. *Comptoir d'Escompte de Paris*, L. R. 5 P. C. 253; 42 L. J. P. C. 60; 29 L. T. 192.

(*k*) Or it may pass no property at all, as, *e.g.*, where it is indorsed to an agent for some special purpose. The effect depends upon the circumstances of the case and the intention of the parties. The chief exposition of the law on this point is contained in *Sewell* v. *Burdick*, 10 A. C. 74; 54 L. J. Q. B. 156; 52 L. T. 445.

(*l*) *Sewell* v. *Burdick* (*ubi supra*).

(*m*) *Fuentes* v. *Montis*, L. R. 3 C. P., at p. 276; 38 L. J. C. P. 95. As to stoppage in transit, see *post*, Part II., Chapter IV.

(*n*) *Post*, Part II., Chapter IV.

his assignor, and has no more effect than a transfer of the goods themselves (*o*).

Freight is the reward paid under a charterparty or bill of lading for the carriage of goods; it is payable primarily by the person making the contract, *i.e.*, the charterer or shipper, but, under *s.* 1 of the *Bills of Lading Act*, 1855 (*p*), it may also be payable by the consignee named in, or the assignee of, the bill of lading (*q*).

"The true test of the right to freight is the question whether the service in respect of which the freight was contracted to be paid has been substantially performed, and according to the law of England, as a rule, freight is earned by the carriage and arrival of the goods ready to be delivered" (*r*). The right to freight is lost if the goods, for any reason other than the fault of their owner (*s*), fail to arrive at their destination, but it is not lost because the goods arrive in a damaged condition, unless the damage is so great that their nature has been altered (*t*). If the shipowner delivers only part of the goods shipped, he is entitled to freight *pro rata* (*u*); if he delivers the goods at a place short of their destination he may, under an express or inferred agreement with their owner, be entitled to freight *pro rata itineris* (*x*); but such an agreement will be inferred only when there is "a voluntary acceptance of the goods by their owner at an intermediate port in such a mode as to raise a fair inference that the further carriage of the goods is intentionally dispensed with" (*y*).

In some cases freight is made payable before delivery of the

(*o*) *Cole* v. *North Western Bank*, L. R. 10 C. P., at p. 363; 44 L. J. C. P. 233.

(*p*) *Ante*, p. 327.

(*q*) In a bill of lading there is usually, as in the form in the text, a clause making delivery conditional upon payment of freight by the consignee or his assigns. A charterparty frequently contains a *cesser clause*, by which the liability of the charterer for freight terminates when the cargo is loaded, the shipowner thereafter relying upon his lien.

(*r*) *Dakin* v. *Oxley*, 15 C. B. (N.S.), at pp. 664, 665; 33 L. J. C. P. 115; 10 L. T. 268.

(*s*) *Cargo* ex *Galam*, Brow. & Lush. 167; 33 L. J. Ad. 97.

(*t*) *Asfar & Co.* v. *Blundell*, [1896] 1 Q. B. 123; 65 L. J. Q. B. 138.

(*u*) *Dakin* v. *Oxley* (*ubi supra*).

(*x*) *Id.*

(*y*) *The Soblomsten*, L. R. 1 Ad. & Eccl., at p. 297; 36 L. J. Ad. 5; 15 L. T. 393. The rules given in this paragraph do not apply to *lump sum freight*, which is a gross amount paid for the use of the ship, irrespective of the amount of the cargo.

goods. Such freight is termed *advance freight*. It is payable although the goods have been lost before the date of payment, but after the due date of payment, and it cannot be recovered if the goods are lost subsequently to payment (*z*).

Lien of shipowner for freight.—In addition to his rights of action a shipowner also has, at Common Law, a possessory lien for freight (*a*). This lien exists over all goods coming to the same consignee on the same voyage for the freight due on all or any part of the goods (*b*). It exists only where the agreed time of payment is contemporaneous with the time of delivery of the goods (*c*); it does not, therefore, exist for freight payable after delivery (*d*). By express agreement, however, a right of lien may exist in respect of other charges, such as dead freight (*e*) or demurrage (*f*); against the charterer, the lien exists for the freight due under the charterparty; but as against other persons it exists only for the freight due under the bill of lading, except in so far as some contrary stipulation is expressed in the bill of lading (*g*). The lien may be waived, as, *e.g.*, by the acceptance of a bill of exchange for the freight, in which case the lien is lost while the bill is outstanding (*h*). And, since it depends upon possession, it is lost by parting with the possession of the goods.

But by *ss.* 492—501 of the *Merchant Shipping Act*, 1894 (*i*),

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(*z*) *Byrne* v. *Schiller*, L. R. 6 Ex. 319; 40 L. J. Ex. 177; 25 L. T. 211; *Smith, Hill & Co.* v. *Pyman, Bell & Co.*, [1891] 1 Q. B., at p. 46; 60 L. J. Q. B. 127; 63 L. T. 642; see also *Oriental S.S. Co.* v. *Tylor*, [1893] 2 Q. B. 518; 63 L. J. Q. B. 128; 69 L. T. 577.

(*a*) He has also a possessory lien for general average contributions (see *ante*, p. 288). See *Huth* v. *Lamport*, 16 Q. B. D. 735; 55 L. J. Q. B. 239; 54 L. T. 633.

(*b*) *Sodergren* v. *Flight*, cited in *Hanson* v. *Meyer*, 6 East, at p. 622; 8 R. R. 572.

(*c*) *Allison* v. *Bristol Marine Insurance Co.*, 1 A. C., at p. 225; 34 L. T. 809.

(*d*) *Foster* v. *Colby*, 3 H. & N. 705; 28 L. J. Ex. 81.

(*e*) *McLean* v. *Fleming*, L. R. 2 H. L. (Sc.) 128; 25 L. T. 317.

(*f*) See, *e.g.*, *Rederiactieselskabet Superior* v. *Dewar & Webb*, [1909] 2 K. B. 998; 78 L. J. K. B. 100; 101 L. T. 371; 25 T. L. R. 821. Here the lien was for "all freight, demurrage and all other charges whatsoever."

(*g*) *Pearson* v. *Goschen*, 17 C. B. (N.S.) 352; 33 L. J. C. P. 265; 20 T. L. R. 199; *Fry* v. *Mercantile Bank*, L. R. 1 C. P. 689; 35 L. J. C. P. 306; 14 L. T. 709; *Turner* v. *Haji Goolam Mahomed Azam*, [1904] A. C. 826; 74 L. J. P. C. 17; 91 L. T. 216; 20 T. L. R. 599.

(*h*) *Tamvaco* v. *Simpson*, L. R. 1 C. P. 363; 35 L. J. C. P. 196; 14 L. T. 893.

(*i*) 57 & 58 Vict. c. 60.

if the owner of goods imported from foreign parts fails to land or take delivery of them at the time agreed, or, if no time is agreed, within 72 hours (exclusive of a Sunday or holiday) from the time of the report of the ship at the Custom House, the shipowner may land or unship the goods and place them at the wharf or warehouse named in the charterparty or bill of lading, or if no such place is named, at some wharf or warehouse in which goods of the like nature are usually placed. And in such a case the shipowner may, by giving written notice to the person in whose custody the goods are placed, retain his lien for freight, and, subject to certain specified conditions, that person may, and, if required by the shipowner, shall, if the lien is not discharged at the end of ninety days (or, if the goods are perishable, at such earlier period as he thinks fit), sell by public auction sufficient of the goods to satisfy the customs dues, expenses and freight.

Liabilities of the shipowner as carrier.—Apart from any express stipulation or statutory provision, a shipowner who is a common carrier is liable in *tort* as an insurer for all loss or damage to the goods in transit, except such as arises from the act of God or the King's enemies, or the inherent defects of the goods themselves (*k*), or from their having been made the subject of a general average sacrifice (*l*). It is not settled whether a shipowner who is not a common carrier has, in the absence of any contrary stipulation, the same liability as a common carrier or whether he is only liable as a bailee for his own default or negligence (*m*).

Charterparties and bills of lading represent the efforts of many generations of shipowners to free themselves from liability by special contracts. At first the exceptions were few, but gradually addition after addition was made until the shipowner was protected against almost every conceivable risk and in some cases even against his own negligence or that of his servants or agents (*n*).

(*k*) *Ante*, p. 307.

(*l*) *Ante*, p. 288.

(*m*) See *Liver Alkali Co.* v. *Johnson*, L. R. 7 Ex. 267; 9 Ex. 338; 43 L. J. Ex. 216; 31 L. T. 95 (discussed in *Watkins* v. *Cottell*, [1916] 1 K. B. 10; 85 L. J. K. B. 287; 114 L. T. 333; 32 T. L. R. 91); *Nugent* v. *Smith*, 1 C. P. D. 19, 243; 45 L. J. C. P. 697; 34 L. T. 827; *The Xantho*, 12 A. C., at p. 510; 56 L. J. Ad. 146; 55 L. T. 203; *Hamilton* v. *Pandorf*, 12 A. C., at p. 526; 57 L. J. Q. B. 24; 57 L. T. 726.

(*n*) Exceptions in a charterparty apply to a preliminary voyage to the

With regard, however, to the exceptions, the following points must be noted: In the first place, neither the Common Law exceptions nor any express exceptions or stipulations in the charterparty or bill of lading will excuse the shipowner if he or his servants could by reasonable care have avoided the operation of the excepted peril or lessened its effects unless there is also a stipulation exempting him from the negligence of his servants (*o*). In the second place, subject to any plain and express stipulation to the contrary (*p*), the benefit of any exception or stipulation may be qualified or lost by the operation of certain undertakings that are implied in every contract for the carriage of goods by sea.

These *implied undertakings* are (i) that the ship is seaworthy; (ii) that it shall commence and carry out the voyage with reasonable dispatch, and (iii) that it shall not deviate unjustifiably.

The implied undertaking of seaworthiness before the commencement of the carrying voyage has already been noted (*q*). Subject to the provisions of the Carriage of Goods by Sea Act, 1924, there is an absolute warranty that the ship, at the commencement of the carrying voyage, or when the voyage is in stages, at the commencement of each stage (*r*), "not only . . . shall be seaworthy in the ordinary sense of the word—that is to say, that she shall be tight, staunch and strong and reasonably fit to encounter whatever perils may be expected on the voyage—but also that both the ship and her furniture and equipment shall be reasonably fit for receiving the contract cargo and carrying it across the sea" (*s*).

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place of loading (*Barker* v. *M'Andrew*, 18 C. B. (N.S.) 759; 34 L. J. C. P. 191; 144 R. R. 657).

(*o*) *Notara* v. *Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 26 L. T. 442; *The Xantho*, 12 A. C. 503; 56 L. J. Ad. 146; 55 L. T. 203; *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B., at p. 576; 90 L. J. K. B. 1353; 126 L. T. 154; 37 T. L. R. 940.

(*p*) See *Nelson Line, Ltd.* v. *James Nelson & Sons, Ltd.*, [1908] A. C. 16; 77 L. J. K. B. 82; 97 L. T. 812; 24 T. L. R. 114; *L. & N. W. Railway* v. *Neilson*, [1922] 2 A. C., at p. 266; 91 L. J. K. B. 680; 127 L. T. 469; 38 T. L. R. 653.

(*q*) *Ante*, p. 322.

(*r*) *McFadden* v. *Blue Star Line*, [1905] 1 K. B., at p. 704; 74 L. J. K. B. 423; 93 L. T. 52; 21 T. L. R. 345.

(*s*) *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.*, [1924] A. C., at p. 530; 93 L. J. K. B. 625; 131 L. T. 449; 40 T. L. R. 464 (reviewing the authorities).

A breach of this implied warranty of seaworthiness does not put an end to the contract of affreightment (*t*), but, if unseaworthiness is the cause of any loss or damage, prevents the carrier from relying on any exception or provision limiting his liability (*u*).

Delay in arriving at the port of loading has already been mentioned (*x*). Any unjustifiable delay in the prosecution of the voyage will put an end to the contract if it is so great as to frustrate the commercial object of the voyage, otherwise it will give rise to a claim for damages (*y*) unless the delay is due to excepted perils (*z*).

Deviation is permissible, apart from the provisions of the Carriage of Goods by Sea Act, 1924, only to avoid danger to the ship and for the purpose of saving the lives of those on board another vessel in distress (*a*). Unjustifiable deviation puts an end to the contract (*b*).

Where the contract is put an end to, the carrier is deprived of the benefit of any special conditions and exceptions limiting his liability, and is remitted to whatever rights he would have at Common Law independently of the special contract; thus, if he is a common carrier, he is liable unless he can show that the loss or damage is due to one of the Common Law exceptions and that it would have happened although there had been no deviation (*c*).

(*t*) *Kish* v. *Taylor*, [1912] A. C. 604; 81 L. J. K. B. 1027; 106 L. T. 900; 28 T. L. R. 425.

(*u*) *Atlantic Shipping, etc.* v. *Dreyfus*, [1922] 2 A. C., at p. 260; 91 L. J. K. B. 518; 127 L. T. 415; 38 T. L. R. 556; *The Christel Vinnen*, [1924] P., at pp. 212, 213; 93 L. J. P. 138; 132 L. T. 337; 40 T. L. R. 845; *Elder, Dempster Co.* v. *Paterson, Zochonis Co.*, [1924] A. C., at pp. 548, 549; 93 L. J. K. B. 625.

(*x*) *Ante*, p. 322.

(*y*) *Bank Line, Ltd.* v. *Arthur Capel & Co.*, [1919] A. C., at pp. 457, 458; 88 L. J. K. B. 211; 120 L. T. 129; 35 T. L. R. 150; see also *Brandt* v. *Liverpool, etc., Navigation Co.*, [1924] 2 K. B. 575; 93 L. J. K. B. 646; 130 L. T. 392.

(*z*) *Barker* v. *M'Andrew*, 18 C. B. (N.S.) 759; 34 L. J. C. P. 191; 144 R. R. 657.

(*a*) *Scaramanga* v. *Stamp*, 5 C. P. D. 295; 49 L. J. C. P. 674; 42 L. T. 840.

(*b*) See cases cited in the next note.

(*c*) *Joseph Thorley, Ltd.* v. *Orchis S.S. Co.*, [1907] 1 K. B., at p. 669; 76 L. J. K. B. 595; 96 L. T. 488; 23 T. L. R. 838; *Morrison* v. *Shaw, Savill & Co.*, 85 L. J. K. B. 724; affirmed, [1916] 2 K. B. 783; 115 L. T. 308; 32 T. L. R. 712; *Buerger* v. *Cunard S.S. Co.*, [1925] 2 K. B. 646; 94 L. J. K. B. 697; 133 L. T. 309; 41 T. L. R. 475. As to frustration of the contract as a result of events not within the control of the carrier, see *ante*, p. 172.

The *implied undertaking by a shipper* not to ship dangerous goods without notice applies to carriage by sea as well as to carriage by land (*d*). By the *Merchant Shipping Act*, 1894 (*e*), penalties are imposed upon any one who sends by any vessel, or who, not being the master or owner of the vessel, carries thereon any dangerous goods (as defined by the Act) without marking their nature on the package and giving written notice of their nature and of the name and address of the sender to the master or owner of the ship, and also upon any one who sends or carries such goods under a false description or who falsely describes the sender or carrier thereof: dangerous goods which have been sent or brought aboard any vessel without being so marked or without notice of their nature may be thrown overboard by the master or declared forfeited and disposed of by any Court having Admiralty jurisdiction.

Statutory limitation of liability.—By the *Merchant Shipping Act*, 1894 (*f*), the owner of a *British* ship (including by the *Merchant Shipping Act*, 1906 (*g*), any charterer to whom the ship is demised) is not liable at all for any loss of or damage to goods happening without his actual fault or privity in the following cases:—

i. Where goods, merchandise, or other things whatsoever (*h*) taken in or put on board his ship are lost or damaged by fire (*i*).

ii. Where gold, silver, diamonds, watches, jewels or precious stones taken in or put on board his ship (*j*), the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading, or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, or making away with.

(*d*) See *ante*, p. 307.
(*e*) Ss. 446—450.
(*f*) 57 & 58 Vict. c. 60, s. 502.
(*g*) 6 Edw. 7, c. 48, s. 71.
(*h*) These words include passengers' luggage (*The Stella*, [1900] P. 161; 69 L. J. P. 71).
(*i*) "Fire" includes smoke, and also water used in putting out fire (*The Diamond*, [1906] P. 282; 75 L. J. P. 90).
(*j*) *E.g.*, a gold watch, cigar cutter, and sovereign purse containing £5, stolen from a passenger's cabin (*Smitton* v. *Orient Steam Navigation Co.*, 96 L. T. 848).

By the same Acts (*k*), where, without the actual fault or privity of the owner or charterer of any ship, British or foreign—

(a) loss of life or personal injury is caused to a person carried on the ship;

(b) damage or loss is caused to goods, etc., carried on the ship;

(c) loss of life or personal injury is caused to a person carried in another vessel by the improper navigation of the ship;

(d) damage or loss is caused by the improper navigation of the ship to any other vessel, or to goods on any other vessel, or, by the *Merchant Shipping Act*, 1900 (*l*), to property or rights of any kind, whether on land or water;

the amount of liability is limited as follows:—

i. In respect of loss of life or personal injury, either alone or together, with loss of, or damage to, vessels, goods, etc., to an aggregate amount not exceeding £15 per ton of his ship's tonnage.

ii. In respect of loss of or damage to vessels, goods, etc., whether or not there be in addition loss of life or personal injury, an aggregate amount not exceeding £8 per ton.

These provisions may, however, be excluded by an express contrary stipulation (*m*).

By the *Carriage of Goods by Sea Act*, 1924, the power of a carrier to exempt himself from liability by conditions and stipulations in a bill of lading has, in certain cases, been limited, and, in the cases to which the Act applies, his responsibilities, liabilities, rights and immunities have been definitely fixed.

The Act and the Rules in the Schedule apply *only to the carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland* to any other port, whether in or outside Great Britain or Northern Ireland [*s.* 1].

They apply *only to contracts of carriage covered by a bill of*

(*k*) 57 & 58 Vict. c. 60, s. 503; 6 Edw. 7, c. 48, s. 71.
(*l*) 63 & 64 Vict. c. 32, s. 1.
(*m*) *The Satanita*, [1897] A. C. 59; 68 L. J. P. 1 (a decision upon a similar section of the Merchant Shipping Act Amendment Act, 1862).

lading or any similar document of title in so far as such document relates to the carriage of goods by sea [*Schedule, Art. I (b)*]. They do not therefore apply to charterparties, but they apply to bills of lading or any similar documents issued under a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same (*n*) [*Schedule, Art. I (b), Art. V*].

Every bill of lading, or similar document of title, issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provision of the Rules as applied by the Act (*o*) [*s.* 3].

The term " carrier " includes the owner or the charterer who enters into a contract of carriage with a shipper: the term " goods " includes goods, wares, merchandises, and articles of every description, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried: the term " carriage of goods " covers the period from the time when the goods are loaded on to the time when they are discharged from the ship [*Schedule, Art. I (a) (c) (e)*].

Subject to Article VI, under every contract of carriage of goods by sea, the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods is subject to the following responsibilities and liabilities and is entitled to the following rights and immunities [*Art. II*].

His responsibilities and liabilities are regulated by Article III. He is bound, before and at the beginning of the voyage, to exercise due diligence to

(i) " Make the ship seaworthy."
(ii) " Properly man, equip, and supply the ship."
(iii) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation [*Art. II* (1)].

With regard to this rule it must be noted that the obligation

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(*n*) See *ante*, p. 326.
(*o*) By Art. V. of the Rules it is also provided that if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of the Rules.

of the shipowner is merely to *exercise due diligence* to make the ship seaworthy; *by s. 2 of the Act no absolute undertaking of seaworthiness is to be implied in contracts to which the Rules apply.* It must also be noted that his obligation refers only to *making,* not keeping, the ship seaworthy, so that it relates only to the commencement of the voyage and not to the commencement of each stage.

Subject to Article IV, the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried [*Art. III* (2)]. After receiving the goods into his charge the carrier or the master or agent of the carrier must issue to the shipper on demand by him, a bill of lading showing among other things (i) the leading identification marks of the goods as furnished in writing by the shipper, provided that they are properly stamped or shown clearly on the goods; (ii) the number of packages or pieces or the quantity or weight of the goods, as furnished in writing by the shipper; (iii) the apparent order and condition of the goods: no carrier, master or agent is, however, bound to state or show on the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting to be inaccurate, or which he has had no reasonable means of checking [*Art. III* (3)].

Such a bill of lading will be *prima facie* evidence of the receipt by the carrier of the goods as therein described, and the shipper will be deemed to have guaranteed to the carrier the accuracy, at the time of shipment, of the marks, number, quantity, or weight, and must indemnify the carrier against all loss, damages and expenses resulting from any inaccuracy therein: but the right of the carrier to this indemnity will not limit his responsibility under the contract to any person other than the shipper [*Art. III* (4) (5)] (*p*).

Unless written notice of loss or damage and its general nature is given to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery under the contract of carriage, or, if the loss or damage be not apparent, within three days, such

(*p*) By s. 5 of the Act, the provisions of Art. III. (4) and (5) do not in certain circumstances apply, so far as concerns weight, to a "bulk cargo"—*e.g.*, coal, timber, grain, etc.

removal will be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. Written notice is not, however, necessary if the state of the goods has at the time of their receipt been the subject of joint survey or inspection. *In any event the carrier will be discharged from all liability in respect of loss or damage unless action is brought within one year after delivery of the goods or the date when the goods should have been delivered* [*Art. III* (6)].

After the goods are loaded the bill of lading to be issued to the shipper shall, if he so demands, be a "shipped" bill of lading, as against the issue of which the shipper shall surrender any document of title to the goods that he has previously taken up: but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master or agent with the name of the ship and the date of shipment, and when so noted will be deemed to constitute a "shipped" bill of lading [*Art. III* (7)] (*q*).

Any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations imposed by this Article or lessening such liability otherwise than as provided in the Rules is null and void. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability [*Art. III* (8)].

The *rights and immunities of the carrier* are defined by *Article IV* of the *Schedule*.

He is not liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on his part to comply with the requirements of Article III (1), but whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence will be upon him.

(*q*) A "shipped" bill of lading is the ordinary bill of lading beginning with the word "Shipped." It is here used to distinguish this form of bill of lading from a "received for shipment" bill of lading, which begins with the words "Received for shipment," and is frequently used in certain circumstances as, *e.g.*, when goods which are received for shipment in a general ship which will be taking in cargo for several days, cannot be placed on board until other bulkier or heavier articles have been properly stowed; see *The Marlborough Hill*, [1921] 1 A. C. 444; 90 L. J. P. C. 87; 124 L. T. 645; 37 T. L. R. 190. There is, at present, some doubt whether a "received for shipment" bill of lading is for all purposes a "bill of lading."

He is not responsible for loss or damage resulting from (a) Act, neglect, or default of the master, pilot or servants in the navigation or management of the ship: (b) Fire, unless caused by his actual fault or privity: (c) Perils, dangers and accidents of the sea or other navigable waters: (d) Act of God: (e) Act of war: (f) Act of public enemies: (g) Arrest or restraint of princes, rulers or people, or seizure under legal process: (h) Quarantine restrictions: (i) Act or omission of the shipper or owner of the goods or his agent: (j) Strikes or lock-outs or stoppage or restraint of labour: (k) Riots and civil commotions: (l) Saving or attempting to save life or property at sea: (m) Wastage or any other loss or damage arising from inherent vice of the goods: (n) Insufficiency of packing: (o) Insufficiency or inadequacy of marks: (p) Latent defects not discoverable by due diligence: (q) Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of his servants or agents, the burden of proof being, however, upon him to show that no such fault, privity, or neglect contributed to the loss or damages [*Art. IV* (2)].

The shipper will not be responsible for loss or damage sustained by the carrier resulting from any cause without the act, neglect, or fault of the shipper or his agents or servants [*Art. IV* (3)]. Any deviation in saving or attempting to save life *or property* at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of the rules or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom [*Art. IV* (4)]. The carrier will in no event become liable for any loss or damage to goods in an amount exceeding the sum of £100 per package or unit (or such other maximum not less than £100 as may be agreed between him and the shipper) unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, in which case the declaration in the bill of lading will be *prima facie* evidence but not binding or conclusive against the carrier. In no event will the carrier be responsible for loss or damage to goods if their nature or value has been knowingly misstated by the shipper in the bill of lading [*Art. IV* (5).]

Goods of an inflammable, explosive or dangerous nature, to the shipment whereof the carrier has not consented with knowledge of

their character, may at any time be landed, destroyed, or rendered innocuous by the carrier without compensation, and the shipper of such goods will be liable for all damages and expenses directly or indirectly arising from such shipment. And if any such goods shipped *with* such knowledge become a danger to the ship or cargo they may similarly be landed, destroyed, etc., without liability on the part of the carrier, except to general average, if any [*Art. IV* (6)].

By *Article V* a carrier may surrender in whole or in part all or any of his rights or immunities or may increase any of his responsibilities and liabilities under the Rules, provided that such surrender or increase is embodied in the bill of lading.

Special conditions. By s. 4 of the Act and Article VI of the Rules it is provided that—

i. In relation to the carriage of goods by sea by ships carrying goods from any port in Great Britain or Northern Ireland to any other port in Great Britain or Northern Ireland or to a port in the Irish Free State (*r*), and

ii. In other cases, in regard to "any particular goods," that is to say not in regard to "ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement" (*s*)—

a carrier and a shipper may enter into an agreement in any terms as to the responsibilities, liabilities, rights and immunities of the carrier, or his obligation as to seaworthiness so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents with regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods, provided that no bill of lading is issued and that the terms agreed upon are embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

By *Article VII* nothing in the Rules shall prevent a carrier or

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(*r*) S. 4. (*s*) Art. VI.

shipper from entering into any agreement or stipulation as to the responsibility of the carrier for loss or damage to goods prior to their loading and subsequently to their discharge.

By *Article VIII* nothing in the Rules is to affect the rights and obligations of the carrier under any statute in force relating to the limitation of the liability of owners of sea-going vessels.

By *s.* 6 (1) *of the Act* nothing in the Act shall affect the operation of ss. 446—450, 502 and 503 of the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or the operation of any other enactment for the time being in force limiting the liability of the owners of sea-going vessels.

Who can sue and be sued for failure to carry safely.—In an action of *contract*, the parties to the contract are the persons to sue or be sued, but by *s.* 1 of the *Bills of Lading Act*, 1855, a consignee or indorsee to whom the property has passed has the same rights of action as if the contract had been made with himself (*t*). In *tort*, any person who is or was in possession of the goods can be sued by any person with any proprietary right in the goods (*u*).

Duties and powers of master during voyage.—The conduct of the ship during the voyage is in the hands of the master, who has implied authority as agent for the owner and the charterer to do whatever is necessary for the proper carrying out of the contract (*x*), or " usual and necessary for the use and enjoyment of the ship " (*y*). The master is also a bailee of the goods and bound to take reasonable care of them and reasonable measures for their preservation (*z*).

In certain circumstances, moreover, the master, as an *agent of necessity* for either the shipowner or cargo-owner, may take extraordinary steps, such as selling the cargo, or raising money by bottomry (*a*) on the ship, freight and cargo or the cargo

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(*t*) *Ante*, p. 327.

(*u*) *Ante*, p. 309.

(*x*) *The Turgot*, 11 P. D. 21; 54 L. T. 276; *Morgan* v. *Castlegate S.S. Co.*, [1893] A. C. 38; 62 L. J. P. C. 17; 68 L. T. 99; 9 T. L. R. 139.

(*y*) *Grant* v. *Norway*, 10 C. B., at p. 687; 20 L. J. C. P. 93; 84 R. R. 747.

(*z*) *Notara* v. *Henderson*, L. R. 7 Q. B. 225; 41 L. J. Q. B. 158; 26 L. T. 442.

(*a*) A bottomry contract is an agreement whereby the ship (with or without the freight or cargo), or the cargo alone (in which case the contract is sometimes called *respondentia*) is hypothecated as a security for the payment, in

alone (*b*), or pledging the credit of the owner for necessaries (*c*). But to justify any such step, he must show (i) that it was necessary, *and* (ii) that it was impossible for him to communicate with the shipowner or cargo-owner, as the case may be, or any agent for either, *or* that, having communicated, he received no instructions (*d*). The rule that the authority of the master to take such steps is based upon necessity is more stringent as regards the cargo-owner than the shipowner, for the master does not take goods on board as agent for the former, and is not his agent at all unless an overruling necessity arises during the voyage (*e*). And even in such a case, the foundation of the master's authority is the prospect that the course which he adopts will be most beneficial to the cargo (*f*).

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the event only of the safe arrival of the ship at her destination, of money advanced for the necessities of the ship to enable it to proceed upon its voyage (*The Atlas*, 2 Hag. Adm. 53). It is essential to a bottomry contract that there should be a *maritime risk—i.e.*, that the money should be repayable only if the ship or cargo arrives safely at its destination and that it should not be an advance upon the personal credit of the shipowner, master or cargo-owner (*Stainbank* v. *Shepard*, 13 C. B. 418; 22 L. J. Ex. 341; 93 R. R. 599; *The Heinrich Bjorn*, 10 P. D. 44; 11 A. C. 270; 55 L. J. Ad. 80; 55 L. T. 66).

(*b*) *Atlantic Mutual Insurance Co.* v. *Huth*, 16 Ch. D. 474; 44 L. T. 67. To justify a sale of cargo it must be shown that the master could not by any means available to him carry the goods, or procure the goods to be carried, to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival at their destination (16 Ch. D., at p. 481). *Part* of the cargo may be sold, or the whole cargo may be bound by a bottomry bond, in order to raise money for the completion of the voyage; but such dealings can be justified only if the money can be raised in no other way, and only if they are for the benefit of the cargo (*The Onward*, L. R. 4 Ad. & Eccl., at p. 57; 42 L. J. Ad. 61; 28 L. T. 204). Raising money on bottomry is never justifiable if the master can obtain money upon his personal credit or the credit of the owner (*Heathorn* v. *Darling*, 1 Moore, P. C. 5; *Soares* v. *Rahn*, 3 P. C. 11). Where part of the cargo is so sold to raise money the owner may either treat the proceeds as a loan to the shipowner, or, if the vessel reaches its destination, he may claim compensation for any loss occasioned by the sale, in which case he must pay the freight which would have been earned if it had been carried to its destination (*Hopper* v. *Burness*, 1 C. P. D. 137; 45 L. J. C. P. 377; 34 L. T. 528).

(*c*) *Gunn* v. *Roberts*, L. R. 9 C. P. 331; 43 L. J. C. P. 223.

(*d*) *Australasian Steam Navigation Co.* v. *Morse*, L. R. 4 P. C. 222; 27 L. T. 357; *The Karnak*, L. R. 2 P. C. 505; 38 L. J. Ad. 57; 21 L. T. 159.

(*e*) *The Pontida*, 9 P. D., at p. 180; 53 L. J. Ad. 78.

(*f*) *The Onward*, L. R. 4 Ad. & Eccl., at p. 57; 42 L. J. Ad. 61; 28 L. T. 204. Thus the act of the master in properly jettisoning cargo is done by him, as the agent of the cargo-owner, for the benefit of both ship and cargo (*Burton* v. *English*, 12 Q. B. D., at pp. 220, 221; 53 L. J. Q. B. 133; 49 L. T. 768).

CHAPTER IV.

SALE OF GOODS. PLEDGES AND MORTGAGES OF CHATTELS.

SECTION 1.—*Sale of Goods.*

The law relating to the sale of goods has been codified by the *Sale of Goods Act*, 1893 (*a*).

By the Act, " goods " include " all chattels personal other than things in action, and also emblements [industrial growing crops] and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale " (*b*).

The term " goods " applies to all *choses in possession* which are the subject of property, except money. But even a current coin may be treated as goods if it is sold as a curiosity (*c*).

(*a*) 56 & 57 Vict. c. 61. Where, therefore, earlier decisions are cited as illustrations, it must be remembered that they are binding only in so far as they are consistent with the Act. It is the statute alone which must be looked at, and must govern the rights of the parties (*Bristol Tramways, etc., Co.* v. *Fiat Motors, Ltd.*, [1910] 2 K. B., at p. 836; 79 L. J. K. B. 1107). But by s. 61 (2), the rules of the Common Law continue to apply where they are not inconsistent with the Act.

(*b*) S. 62.

(*c*) *Moss* v. *Hancock*, [1899] 2 Q. B. 111; 68 L. J. Q. B. 657; 80 L. T. 693; 15 T. L. R. 353.

Animals *ferae naturae* are not chattels or the subject of property until they are reduced into possession (*R.* v. *Roe*, 11 Cox, at p. 557).

A ship is " goods " within s. 62 of the Act (*Behnke* v. *Bede S.S. Co.*, [1927] 1 K. B. 649), but British ships are governed by statutory rules which in some respects modify the Sale of Goods Act. Of these rules the following are the most important. Subject to certain trivial exceptions, every British ship must be registered (Merchant Shipping Act, 1894, ss. 2 and 3). The property in a British ship is divided into sixty-four equal shares and, subject to the provisions of the Act as to joint owners or owners by transmission, not more than sixty-four individuals may be registered at the same time as owners of any one ship. A person is not entitled to be registered as owner of any fractional part of a share, but any number of persons not exceeding five may be registered as joint owners of a ship or share and are for the purposes of registration considered as one owner (*id.*, s. 5). A registered ship, or any share therein, must be transferred by a bill of sale in the form prescribed by the Act, or as near thereto as circumstances permit, and executed by the transferor in the presence of, and attested by, a witness or witnesses (*id.*, s. 24). All such bills of sale must be entered in the register-book in the order of their production to the Registrar (*id.*, s. 25).

Formation of the Contract.—" A *contract of sale* of goods is a contract whereby the seller (i) transfers or (ii) agrees to transfer the property in goods to the buyer for a money consideration, called the price." " Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a *sale*; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an *agreement to sell.*" " An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred " (*d*).

Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property (*e*).

Form of the Contract.—Subject to the provisions of the Act and of any other statute, " a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth or may be implied [or inferred] from the conduct of the parties " (*f*).

When writing is required—

A. Where a contract for the sale of goods is not to be performed within one year from the making thereof, it is governed by s. 4 of the Statute of Frauds (*g*).

B. A contract for the sale of goods of the *value* (*not* price)

Mortgages of any ship or share therein must also be in the prescribed form or as near thereto as circumstances permit and must be recorded in the register-book, and, if more than one mortgage is registered in respect of the same ship or share, the mortgagees are entitled in priority one over the other, according to the date at which each mortgage is recorded (*id.*, s. 23). If a registered owner desires to mortgage or sell a ship or any share therein at any place out of the country in which the port of registry is situated he may apply to the Registrar, who, subject to the provisions of the Act, must enable him to do so by granting him a certificate of mortgage or sale (*id.*, ss. 39—46).

(*d*) S. 1 (1), (3), (4). A contract for a chattel to be made and delivered is a contract for the sale of goods and not a contract for work and labour; see *Lee* v. *Griffin*, 1 B. & S. 272; 124 R. R. 555; 30 L. J. Q. B. 252 (contract for the supply of a set of false teeth). By s. 61 (4) the provisions of the Act do not apply to any transaction which is intended to operate by way of mortgage, pledge, charge, or other security.

(*e*) S. 2. As to infants, lunatics, and drunken persons, see *ante*, Part I., Chapter V.

(*f*) S. 3. Nothing in this section, however, affects the law relating to corporations.

(*g*) *Prested Miners' Gas Co.* v. *Garner*, [1911] 1 K. B. 425; 80 L. J. K. B. 819.

of ten pounds or upwards is *also* governed by s. 4 of the *Sale of Goods Act*, and is not "enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf" (*h*). The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof or rendering the same fit for delivery" (*i*).

"There is an *acceptance* of goods *within the meaning of this section* when the buyer *does any act in relation to the goods which recognises a pre-existing contract of sale*, whether there be an acceptance *in performance of the contract* or not" (*k*).

The section applies to a single contract for several articles if their total value is ten pounds or more (*l*).

The rules relating to the requisite note or memorandum in writing have already been discussed (*m*).

Earnest is quite distinct from part payment, being a coin or something of value, such as a ring, given by a buyer to a seller, not on account but irrespective of the price and accepted by the seller to mark the final assent of both parties to the contract (*n*). Part payment, on the other hand, is a payment of part of the price, and to satisfy the statute there must be an actual payment; so that what is called in the North of England "striking off" a bargain—*i.e.*, drawing the edge of a coin over the hand of the seller without actually paying it to him—is not part payment (*o*). Nor is there a part payment where by an express term of the contract of sale itself, money previously

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(*h*) S. 4 (1). (*i*) S. 4 (2).
(*k*) S. 4 (3).
(*l*) *Baldey* v. *Parker*, 2 B. & C. 37.
(*m*) *Ante*, p. 74.
(*n*) See *Goodall* v. *Skelton*, 2 H. Bl. 316; 3 R. R. 479; and as to the history of earnest, *Howe* v. *Smith*, 27 Ch. D., at p. 101; 53 L. J. Ch. 1055; 50 L. T. 573. The sending by a purchaser of bags to contain the goods bought does not amount to giving earnest (*Sumner* v. *Browne*, 25 T. L. R. 475).
(*o*) *Blenkinsop* v. *Clayton*, 7 Taunt. 597; 18 R. R. 602.

owing by the seller to the buyer is to be retained on account of the price of the goods sold (*p*).

The acceptance required by this section of the statute is merely some act by the buyer in *recognition* of the contract, and must be distinguished from acceptance *in performance* of the contract, which is dealt with in later sections. There may be an acceptance which is sufficient to make a verbal contract, enforceable by action, but which does not prevent the buyer, when sued, from setting up that he had a right to reject the goods as not being in accordance with the contract. Thus, in the case of *Abbott & Co.* v. *Wolsey* (*q*), goods sold under a verbal contract were sent by barge to the defendant's wharf. The defendant went on board the barge, took a sample of the hay, and, after examining it, said: "The hay is not to my sample, and I shall not have it." The County Court Judge held that this was an acceptance within the meaning of s. 4 of the Sale of Goods Act, but was reversed by the Divisional Court. The Court of Appeal, pointing out that the only question before them was, not whether there was an acceptance within the statute, but whether there was any *evidence* on which the County Court Judge could so find, held that the act of the defendant in taking a sample, as explained by the words accompanying it, was evidence upon which the County Court Judge might properly come to the conclusion that the sample was taken, not merely in order to inspect the quality of the hay, but to be compared with a former sample given in connection with a contract for the sale of hay, and that the act of taking it was therefore a recognition of an existing contract for the sale of the hay. In a later case, it was also held that there was an acceptance within the Act where the purchaser obtained from the vendor a sample of the goods, by means of which he tried to sell the goods (*r*).

(*p*) *Norton* v. *Davison*, [1899] 1 Q. B. 401; 68 L. J. Q. B. 265; 80 L. T. 139, following *Walker* v. *Nussey*, 16 M. & W. 302; 16 L. J. Ex. 120; 73 R. R. 507. As to payment by a bill of exchange or cheque, see *ante*, p. 177.

(*q*) [1895] 2 Q. B. 97; 64 L. J. Q. B. 587; 72 L. T. 581. A similar case before the Act is that of *Page* v. *Morgan*, 15 Q. B. D. 228; 54 L. J. Q. B. 434; 53 L. T. 126; but in the later case the Court was careful to point out that the law is now to be found in the Act itself, and not cases decided before the Act.

(*r*) *Taylor* v. *Great Eastern Railway*, [1901] 1 K. B. 774; 70 L. J. K. B. 499.

Acceptance may precede, be contemporaneous with, or follow the receipt (*s*).

The only effect of non-compliance with the conditions of s. 4 is that the contract is "unenforceable by action." The contract itself is good, and all the legal consequences of a valid contract follow; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. The seller may, therefore, call upon the buyer to pay for the goods, and, if he fails to do so, the seller may treat the contract as rescinded, the effect of the rescission being to revest the property in the seller (*t*).

Subject-matter.—Goods which form the subject of a contract of sale may be either *existing goods*, owned or possessed by the seller, or *future goods*, *i.e.*, goods to be manufactured or acquired by the seller after the making of the contract of sale. Where a seller purports to effect a present sale of future goods, the contract operates merely as an agreement to sell (*u*).

Existing goods may be either *specific*, *i.e.*, goods "identified and agreed upon at the time a contract of sale is made" (*x*), or *unascertained*, *i.e.*, goods defined only by a description applicable to all goods of the same class. "Where there is a contract for the sale of specific goods and the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void" (*y*). Thus, if A, a dealer in motor bicycles, contracts to sell to B a particular motor bicycle, the contract is void if, unknown to him, that motor bicycle had been destroyed by fire when the contract was made. But if A, having in stock motor bicycles of a particular make, merely contracted to sell B a motor bicycle of that make, it would be immaterial that his whole stock had been destroyed when the contract was made, and he would be bound to procure another motor bicycle in order to supply B. Similarly, "where there is an agreement to sell specific goods, and subsequently the goods, without any fault of

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(*s*) *Cusack* v. *Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261.

(*t*) *Taylor* v. *Great Eastern Railway* (*ubi supra*).

(*u*) S. 5. But the equitable interest in the goods passes to the buyer as soon as the contract is capable of performance (see *Tailby* v. *Official Receiver*, 13 A. C., at p. 546; 58 L. J. Q. B. 75; 60 L. T. 162).

(*x*) S. 62.

(*y*) S. 6. See *Couturier* v. *Hastie*, 5 H. L. C. 673; 25 L. J. Ex. 253.

the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided " (*z*).

The price.—" The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. Where the price is not so fixed or determined the buyer must pay a reasonable price " (*a*).

" Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in default may maintain an action for damages against the party in fault " (*b*).

Conditions and warranties.—A *condition* is a stipulation which is of the essence of a contract of sale, and the breach of which may give rise to a right to treat the contract as repudiated (*c*). A *warranty* is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (*d*).

Both conditions and warranties are terms of the contract, creating obligations under the contract (*e*), and must be distinguished from *representations* inducing the contract (*f*): an affirmation made at the time of the sale of a specific thing is only a warranty provided it appear on evidence to have been so

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(*z*) S. 7. See *Howell* v. *Coupland*, 1 Q. B. D. 258; 46 L. J. Q. B. 147; 33 L. T. 832 (contract for the sale of a specific crop of potatoes grown on a particular field held to be subject to the implied condition that the seller should be excused if delivery became impossible through the crop perishing without his fault). As to when the risk passes, see *post*, p. 356.

(*a*) S. 8 (1), (2).

(*b*) S. 9.

(*c*) S. 11 (1) (b).

(*d*) S. 62.

(*e*) See the judgment of Fletcher Moulton, L.J., in *Wallis* v. *Pratt* (*infra*).

(*f*) *Ante*, p. 85. This distinction was firmly made as early as 1603 in the case of *Chandelor* v. *Lopus* (Cro. Jac. 4), cited with approval by Viscount Haldane, L.C., in *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A. C. at p. 38.

intended, *i.e.*, provided that it appears to have been the intention of the party making the affirmation that his affirmation should form part of the contract, and should create a contractual liability in respect of its accuracy (*g*). A warranty made *subsequently* to the sale must be supported by some new consideration (*h*).

Whether any particular stipulation in a contract of sale is a condition or warranty depends in each case on the construction of the contract, and a stipulation may be a condition though called a warranty in the contract (*i*). "Where the subject-matter of a contract of sale is a specific existing chattel, a statement as to some quality possessed by or attaching to such chattel is a warranty, and not a condition, unless the absence of such quality or the possession of it to a smaller extent makes the thing sold different in kind from the thing as described in the contract" (*k*).

A breach of a condition *may*, but does not necessarily, lead to a repudiation of the contract. For, in the first place, where the contract is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat its breach merely as a breach of warranty (*l*). And, secondly, where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for *specific* goods, *the property in which has passed to the buyer*, the breach of any condition to be fulfilled by the seller can be treated only as a breach of warranty (*m*).

(*g*) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A. C. 30; 82 L. J. K. B. 245; 107 L. T. 769. This rule applies only to the sale of a specific thing, not to a case in which goods are sold by description, when their answering to that description is a condition of the contract ([1913] A. C., at p. 51; and see *post*, p. 350).

(*h*) *Roscorla* v. *Thomas*, 3 Q. B. 234; 11 L. J. Q. B. 214; 73 R. R. 507.

(*i*) S. 11 (1) (b).

(*k*) *Harrison* v. *Knowles & Foster*, [1917] 1 K. B., at p. 610; 86 L. J. K. B. 1490; 117 L. T. 363; 33 T. L. R. 467.

(*l*) S. 11 (1) (a).

(*m*) S. 11 (1) (c). But for other purposes a condition still remains a condition. Thus A sold to B seed described as "common English sainfoin" on the condition that "sellers give no warranty expressed or implied as to growth, description, or any other matters." The seed was in fact giant sainfoin, a different seed. The purchasers accepted the seed, believing it to be common English sainfoin, and resold it, so that they only had the remedies applicable to a breach of warranty. But since the description was a *condition*, and not a warranty, it was held that the sellers were not protected by the clause negativing any warranty (*Wallis & Wills* v. *Pratt & Haynes*, [1911]

" Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

" In a contract of sale, ' month ' means *prima facie* calendar month " (*n*).

" In a contract of sale, *unless* the circumstances of the case are such as to show a different intention, there is—

" (1) An implied *condition* on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass.

" (2) An implied *warranty* that the buyer shall have and enjoy quiet possession of the goods.

" (3) An implied *warranty* that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made " (*o*).

A. C. 394; 80 L. J. K. B. 1058; 105 L. T. 146; 27 T. L. R. 431). Nothing in s. 11 affects the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise (s. 11 (2)). Moreover, s. 11 (1) (c) does not apply where there is a breach of s. 12 (1); see *infra*, note (*o*).

(*n*) S. 10.

(*o*) S. 12. An instance of a different intention being shown by the circumstances of the case exists where goods of an execution debtor are sold by the sheriff, who gives no undertaking as to title (*Peto* v. *Blaydes*, 5 Taunt. 567; 15 R. R. 609). Another exists in the case of the sale of forfeited pledges by a pawnbroker, who warrants merely that the goods are forfeited pledges, and that he is not cognisant of any defect of title (*Morley* v. *Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148; and see *post*, pp. 357, 378).

There can be no *sale* of goods which the seller has no right to sell. Hence a breach of the condition that the seller has a right to sell the goods may be treated as a ground for rejecting the goods and not merely as a breach of warranty, although the buyer, in ignorance of the seller's want of title, has " accepted " the goods within the meaning of s. 11 (1) (c), which has no application to a breach of this particular condition (*Rowland* v. *Divall*, [1923] 2 K. B. 500; 92 L. J. K. B. 1041; 129 L. T. 757).

There is a breach by the seller of the condition that he has a right to sell where the goods are packed in tins bearing a label or brand which is an infringement of the registered trade mark of another person who can therefore restrain their sale (*Niblett* v. *Confectioners', etc., Co.*, [1921] 3 K. B. 387; 90 L. J. K. B. 984; 125 L. T. 552; 37 T. L. R. 653).

Held also, by Bankes and Atkin, L.JJ., that there is a breach of the implied condition that the goods shall be of merchantable quality (see s. 14 (2), *post*,

" Where there is a contract for the sale of goods by description, there is an implied *condition* that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description " (*p*).

The office of a sample is to show the *quality* of goods; the description indicates their *kind* (*q*). If a man buys goods in reliance entirely upon the description given by the vendor (as, *e.g.*, where he has not seen the goods) (*r*), and the description of the goods tendered to him is different in any respect, they are not the goods bargained for, and he is not bound to take them (*s*). But if the goods are of the description bargained for, he must take the risk as to their quality, unless either (i) the sale is by sample; or (ii) there is some other warranty or condition as to quality; or (iii) they are so adulterated or of so poor a quality as not reasonably to answer to the description, as, *e.g.*, if a man buys an article as gold which consists of gold only to the extent of one carat (*t*).

Even when an article which is sold by description is sold " with all faults," that expression means with all faults consistently with its being the article described (*u*).

As a general rule, there is no implied warranty or condition as to the *quality* or *fitness for any particular purpose* of goods supplied under a contract of sale, except as follows:—

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on

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p. 351), and by Atkin, L.J., that there is a breach of the implied warranty that the buyer shall have and enjoy quiet possession of the goods.

(*p*) S. 13.

(*q*) *Nichol* v. *Godts*, 10 Ex. 191; 23 L. J. Ex. 314.

(*r*) *Varley* v. *Whipp*, [1900] 1 Q. B. 513; 69 L. J. Q. B. 333; see also *Thornett & Fehr* v. *Beers*, [1919] 1 K. B. 486; 88 L. J. K. B. 684; 120 L. T. 570.

(*s*) See *Bowes* v. *Shand*, 2 A. C., at p. 480; 46 L. J. Q. B. 561; 36 L. T. 857.

(*t*) See *Wieler* v. *Schilizzi*, 17 C. B., at pp. 624, 625; 25 L. J. C. P. 89.

(*u*) See *Shepherd* v. *Kaine*, 5 B. & Ald. 240; 24 R. R. 344. In this case a ship described as " copper fastened " was sold " with all faults." The ship not being in fact copper fastened, it was held that the vendor was not protected by this stipulation, which meant " with all faults consistently with its being a copper-fastened vessel."

the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied *condition* that the goods shall be reasonably fit for such purpose, *provided that*, in the case of a contract for the sale of a *specified article under its patent or other trade name*, there is no implied condition as to its *fitness for any particular purpose* (*x*).

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; *provided that* if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed (*y*).

(*x*) S. 14 (1). The first part of this sub-section merely reproduces the common law rule that if a man knowingly sells an article for a particular purpose there is an implied condition that it is reasonably fit for that purpose: if, therefore, goods are ordered for a particular purpose which expressly or by implication is made known to the vendor such a contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment (*Manchester Liners, Ltd.* v. *Rea, Ltd.*, [1922] 2 A. C. 74; 91 L. J. K. B. 504; 127 L. T. 405; 38 T. L. R. 526). The description of the article itself may indicate the particular purpose for which it is required. Thus, on the sale of a hot-water bottle, there is an implied warranty that it is fit for use as such (*Priest* v. *Last*, [1903] 2 K. B. 148; 72 L. J. K. B. 657; 89 L. T. 33), and on the sale of food there is an implied warranty that it is fit for consumption (*Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608; 74 L. J. K. B. 386; *Chaproniere* v. *Mason*, 21 T. L. R. 633; *Jackson* v. *Watson*, [1909] 2 K. B. 193; 78 L. J. K. B. 587), unless such warranty is excluded by custom (see s. 55, *post*, p. 374). Where goods (*e.g.*, mineral waters) are supplied in bottles, the bottles, as well as the contents, must be reasonably fit for the purpose for which they are required; and in such a case it makes no difference whether the bottles are sold or merely hired to the purchaser, for in either case they are "supplied under a contract of sale" (*Geddling* v. *Marsh*, 89 L. J. K. B. 526; [1920] 1 K. B. 668; 122 L. T. 775).

As to the proviso to this sub-section it must be noted that the mere fact that an article is described in the contract by its trade name (as, *e.g.*, an X motor car) does not make the sale a sale under a trade name unless the buyer specifies it under its trade name in such a way as to indicate that he is satisfied that it will answer his purpose and is not relying on the skill or judgment of the seller: but, if the buyer makes known to the seller his requirements so as to show that he relies on the seller's skill and judgment, the proviso does not apply merely because the article is ordered under its trade name (*Baldry* v. *Marshall*, [1925] 1 K. B. 260; 94 L. J. K. B. 208; 132 L. T. 326).

(*y*) S. 14 (2). In the case of *Wren* v. *Holt*, [1903] 1 K. B. 610; 72 L. J. K. B. 340, the defendant kept a beerhouse which only sold beer supplied by a particular brewer. This was known to the plaintiff, who went there for the purpose of getting that beer, and was poisoned by arsenic contained in it.

(3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade (*z*).

(4) In the case of a contract for sale by sample, there are implied *conditions* (a) that the bulk shall correspond with the sample in quality; (b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect (*a*).

(5) By s. 17 of the *Merchandise Marks Act*, 1887 (*b*), it is provided that "on the sale or in the contract for the sale of any goods to which a trade mark, or mark, or

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The jury found that he did not rely on the skill and judgment of the seller so as to bring himself within the previous sub-section, but that he asked for beer of a particular description. It was accordingly held that there was a sale by description, and therefore an implied condition (which had become a warranty: see s. 11 (1) (c), *ante*, p. 348) that the beer was of merchantable quality, and that the proviso did not apply, for the defect could not be revealed by examination. It is not sufficient that the buyer should have had an opportunity of examining the goods; he must have actually examined them. But if he inspect goods in cases or barrels, which he does not take the trouble to have opened, he cannot be heard to say that he has not examined them (*Thornett & Fehr* v. *Beers* (*ubi supra*)). It must be noted that the condition that the goods shall be of *merchantable quality* applies to goods sold under a patent or trade name. Thus, if a man buys a patent razor under its patent name, though he cannot complain if it will not shave, he can do so if the blades will not fit the frame, or if the frame breaks from the brittleness of the steel used (*Bristol Tramways, etc., Co.* v. *Fiat Motors, Ltd.*, [1910] 2 K. B., at pp. 840, 841; 79 L. J. K. B. 1107; 103 L. T. 443; 26 T. L. R. 629).

By s. 62 the term "quality" includes "state or condition." But the term 'merchantable quality" does not cover legal title nor the legal title to sell, and if the goods are in themselves of merchantable or saleable "quality," "state" and "condition" there is no breach of condition merely because they contain an ingredient which, by reason of the local law, renders them unsaleable in the country in which the vendors know they are intended to be sold (*Sumner, Perman & Co.* v. *Webb*, [1922] 1 K. B. 55; 91 L. J. K. B. 228; 126 L. T. 294; 38 T. L. R. 95). The case of *Niblett* v. *Confectioners' Co.* (*ante*, p. 349) was distinguished by Bankes and Atkin, L.JJ., on the ground that there the packing of the goods was part of their "state" or "condition," and rendered them unsaleable anywhere

(*z*) S. 14 (3).

(*a*) S. 15.

(*b*) 50 & 51 Vict. c. 28.

trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of the Act, unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee."

(6) By s. 2 of the *Fertilizers and Feeding Stuffs Act*, 1926, various warranties are implied upon the sale of fertilizers and feeding stuffs.

Effects of the Contract.—As we have already seen, there is a sale only when the property—*i.e.*, the ownership—of goods is transferred to the purchaser (*c*). The question whether the property has been transferred is often of great importance, particularly when the person who has the *possession* of the goods becomes bankrupt, as, *e.g.*, where goods which are the subject of a contract of sale have remained in the possession of a vendor who has been paid for them, or where they have passed into the possession of a purchaser who has not paid for them. If in either case the bankrupt has the property in the goods, they will vest in his trustee for the benefit of the creditors, and the purchaser or vendor will merely rank as a creditor: but if the bankrupt has not the property in the goods they can, subject to certain exceptions (*d*), be claimed by the owner.

The following rules as to the transfer of property are laid down by the Act:—

"Where there is a contract for the sale of *unascertained goods* no property in the goods is transferred to the buyer unless and until the goods are ascertained" (*e*).

"Where there is a contract for the sale of *specific or ascer-*

(*c*) *Ante*, p. 343.

(*d*) As, *e.g.*, if they are in the "reputed ownership" of the bankrupt (*post*, p. 363).

(*e*) S. 16. No property can pass in an unspecified portion of a larger bulk. Thus a purchaser of a given number of bales or barrels out of a larger bulk does not acquire the property in them until they have been separated and appropriated to the contract. See *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 L. J. K. B. 198; 39 R. R. 489; *Campbell* v. *Mersey Docks*, 14 C. B. (N.S.), at p. 414; 135 R. R. 752.

tained goods the property in them is transferred to the buyer *at such time as the parties to the contract intend it to be transferred.* For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case " (*f*).

Unless a different intention appears (*g*), the following are rules for ascertaining the intention of the parties (*h*):—

Rule 1.—" Where there is an *unconditional contract* for the sale of *specific* goods (*i*) *in a deliverable state* (*k*), the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

Rule 2.—" Where there is a contract for the sale of *specific goods*, and the seller is bound to do something to the goods, *for the purpose of putting them into a deliverable state*, the property does not pass until such thing be done *and* the buyer has notice thereof " (*l*).

(*f*) S. 17.

(*g*) See, *e.g.*, *Underwood, Ltd.* v. *Burgh Castle, etc., Syndicate* (*infra*).

(*h*) S. 18.

(*i*) " In order that goods may be specific they must be identified and not merely identifiable " (*Kursell* v. *Timber Operators, etc.*, [1927] 1 K. B., at p. 314). Thus, where there was a contract for the sale of all " merchantable timber " in a forest, defined as " all trunks and branches of trees but not young trees of less than 6 inches in diameter at a height of 4 feet from the ground," with a proviso that the timber was to be cut not more than 12 inches from the ground, it was held that the contract was not a contract for the sale of specific goods (*Id.*). So also a contract for the sale of 500 tons of wheat, part of a consignment arriving by a particular ship is not a contract for the sale of specific goods (*Re Wait, ex p. The Trustee* v. *Humphries & Bobbett*, 163 L. T. 21; 43 T. L. R. 150). Nor, on the sale of goods forming portion of a larger quantity is the mere giving of a delivery note sufficient to pass the property before severance from the bulk (*Laurie & Morewood* v. *Dudin*, [1926] 1 K. B. 223; 95 L. J. K. B. 191; 134 L. T. 309; 42 T. L. R. 149), but it passes the risk (see *post*, p. 356, n. (*q*)).

(*k*) *I.e.*, in such a state that the buyer would, *under the contract*, be bound to take delivery of them (s. 62 (4)). Thus, in the case of *Kursell* v. *Timber Operators, etc.* (*ubi supra*), it was also held that the timber was not in a deliverable state until the purchaser had severed it. So also, where the subject of the contract was an engine, to be delivered free on rail in London, which, before it could be delivered, had to be detached from a concrete bed and dismantled it was held that the property did not pass until this had been done (*Underwood, Ltd.* v. *Burgh Castle, etc., Syndicate*, [1922] 1 K. B. 343; 91 L. J. K. B. 355; 126 L. T. 401; 38 T. L. R. 44). Held, also by Bankes and Atkin, L.JJ., that the circumstances showed an intention that the property should not pass until the engine was placed in safety on rail in London.

(*l*) For an example before the Act, see *Acraman* v. *Morrice*, 8 C. B. 449; 19 L. J. C. P. 57; 70 R. R. 568 (contract for the sale of felled trees, which had to be trimmed before delivery).

Rule 3.—" Where there is a contract for the sale of *specific goods in a deliverable state*, but the seller is bound to weigh, measure, test, or do some other act with reference to the goods, *for the purpose of ascertaining the price*, the property does not pass until such act or thing be done *and* the buyer has notice thereof " (*m*).

Rule 4.—" When goods are delivered to the buyer on approval or ' on sale or return,' or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction (*n*).

(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

Rule 5 (i).—" Where there is a contract for the sale of *unascertained* or *future* goods *by description*, and goods of that description (*o*) and in a deliverable state are *unconditionally appropriated* to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such

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(*m*) See, *e.g.*, *Hanson* v. *Meyer*, 6 East, 614; 8 R. R. 572 (contract for the sale of all the starch lying at a warehouse at so much per cwt.); *Zagury* v. *Furnell*, 2 Camp. 239; 11 R. R. 704 (contract for the sale of bales of skins at so much per dozen skins). Compare *Nanka-Bruce* v. *Commonwealth Trust*, [1926] A. C. 77; 94 L. J. P. C. 169; 134 L. T. 35, where it was held that a provision that the weight of goods should be tested was not a condition precedent to the passing of the property.

(*n*) Thus, in *Kirkham* v. *Attenborough*, [1897] 1 K. B. 201; 66 L. J. Q. B. 149; 75 L. T. 543, the plaintiff was a jeweller, and sent goods to W. on sale or return. W. pawned the goods to the defendant. Held, that the property had passed to the defendant, and that the goods could not be recovered from him by the plaintiff. But it is otherwise where " a different intention appears " from the terms of the contract, for instance, where goods were delivered on the terms of the following memorandum : " On approbation. On sale for cash only or return. . . . Goods had on approbation or on sale or return remain the property of S. W. until such goods are settled for or charged " (*Weiner* v. *Gill*, [1906] 2 K. B. 574; 75 L. J. K. B. 916; 95 L. T. 438; see also *Kempler* v. *Bravingtons*, 133 L. T. 680; 41 T. L. R. 519).

(*o*) See *Vigers* v. *Sanderson*, [1901] 1 Q. B. 608; 70 L. J. K. B. 383; 84 L. T. 464.

assent may be express or implied, and may be given either before or after the appropriation is made." (ii) " Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

" Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions are fulfilled. . . . Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal. . . . Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him " (*p*).

Risk.—" Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk *whether delivery has been made or not*. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred *but for such fault*. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party " (*q*).

(*p*) S. 19 (1) (2) (3).

(*q*) S. 20 (see also s. 32 (2) (3), and s. 33, *post*, p. 366, as to risks in transit). The general rule as to the time at which the risk passes may be varied by custom (see s. 55, *post*, p. 374), *e.g.*, by a custom in a particular trade that when goods are ordered on approval the person ordering them is liable for loss while they are in his hands on approval (*Bevington* v. *Dale*, 7

Transfer of title.—" At Common Law a person in possession of goods could not confer on another, either by sale or pledge, any better title than he himself had " (*r*). To this general rule there were, however, the following exceptions (*s*):—

i. Sales in market overt.

ii. Sales or pledges by a person who had a voidable title. But a person who has no title at all against the true owner—*e.g.*, a thief or a finder (*t*), or person who has acquired goods under a *void* contract (*u*)—can give no title except by sale in market overt.

iii. Sales or pledges by a person who had authority from the true owner, or who was held out as having authority, so that the owner was estopped from denying his authority (*x*).

iv. Dispositions by a person who by law had some special power of dealing with the goods, as, *e.g.*, the power of a landlord to sell goods distrained, or the power of a pawnbroker to sell unredeemed pledges.

The rule and its exceptions are now made statutory by ss. 21—25 of the Sale of Goods Act and ss. 1—10 of the Factors Act, 1889.

By s. 21 of the first-mentioned Act it is provided that " Subject to the provisions of this Act " (*i.e.*, ss. 22—25), " where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the

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Com. Cas. 112). The risk may pass although the property has not passed. Thus, in a contract for the sale of goods forming portion of a larger quantity in the possession of a third party the risk passes as soon as the third party undertakes to the purchaser to deliver to him that portion out of the bulk (*Sterns, Ltd.* v. *Vickers, Ltd.*, [1923] 1 K. B. 78; 92 L. J. K. B. 331; 123 L. T. 402).

(*r*) *Cole* v. *North Western Bank*, L. R. 10 C. P., at p. 363; 44 L. J. C. P. 233; 32 L. T. 733.

(*s*) *Id.*, and see *Nanka-Bruce* v. *Commonwealth Trust*, [1926] A. C., at p. 79; 94 L. J. P. C. 169; 134 L. T. 35.

(*t*) *Farquharson Brothers* v. *King & Co.*, [1902] A. C., at pp. 335—336; 71 L. J. K. B. 667; 85 L. T. 264; 18 T. L. R. 665.

(*u*) *Cundy* v. *Lindsay*, 3 A. C. 459; 47 L. J. Q. B. 481. Compare *Phillips* v. *Brooks, Ltd.*, [1919] 2 K. B. 243; 88 L. J. K. B. 953; 121 L. T. 249; 35 T. L. R. 470. See also *ante*, p. 97.

(*x*) It is not sufficient that the vendor by his conduct enabled the seller to dispose of the goods; it must be shown that he actually held out the seller to the purchaser as his agent (*Farquharson* v. *King* (*ubi supra*)).

owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell (*y*).

" Provided also that nothing in this Act shall affect—

" (a) The provisions of the Factors Acts or any enactment enabling the *apparent* owner of goods to dispose of them as if he were the true owner thereof;

" (b) The validity of any contract of sale under any special common law or statutory power of sale, or under the order of a court of competent jurisdiction " (*z*).

" Where goods are sold *in market overt*, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." But " nothing in this section shall affect the law relating to the sale of horses " (*a*). The expression " market overt " applies only to " an open, public, and legally constituted market " (*b*). In the country the market place, or spot of ground set apart by custom for the sale of particular goods, is the only market overt; but by the custom of London every open shop in the City of London is a market overt for such things as by the trade of the owner are put there for sale by him (*c*). But (i) the sale must be by the shopkeeper, and not to him (*d*); (ii) it must be an open sale, not in a part of the shop which is not " open," or in a back room or showroom to which customers are admitted only by special invita-

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(*y*) S. 21 (1). For a full discussion of this sub-section, see *Heap* v. *Motorists', etc., Agency*, [1923] 1 K. B. 577; 92 L. J. K. B. 553; 129 L. T. 146; 39 T. L. R. 150.

(*z*) S. 21 (1) (2). As to a sale by a bailiff under a warrant of execution, see *Goodlock* v. *Cousins*, [1897] 1 Q. B. 558; 66 L. J. Q. B. 360; 76 L. T. 313.

(*a*) S. 22 (2). This section does not apply to Scotland (*id.*, sub-s. (3)). Nor do the rules of market overt apply to Wales (Chalmers' Sale of Goods Act, p. 74). The sale of horses is governed by complicated regulations laid down by 2 & 3 Phil. & Mar. c. 7, and 31 Eliz. c. 12, which in practice are never observed; the effect, therefore, of these statutes is that practically horses cannot be sold in market overt (*id.*, p. 75). Nor is there any market overt for ships (*Hooper* v. *Gumm*, L. R. 2 Ch., at p. 290; 36 L. J. Ch., at p. 605; 16 L. T. 107). By s. 62 (2), a thing is deemed to be done in good faith when it is in fact done honestly, whether it be done negligently or not.

(*b*) *Lee* v. *Bayes*, 18 C. B., at p. 601; 25 L. J. C. P. 249.

(*c*) For a full discussion of the rules relating to market overt, see *Hargreave* v. *Spink*, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318; 65 L. T. 656, and *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031; 81 L. J. K. B. 89.

(*d*) *Hargreave* v. *Spink* (*ubi supra*).

tion (*e*); (iii) the whole transaction must be in the shop, so that on a sale by sample it is not sufficient for the contract to be made in the shop; the goods themselves must be exposed there (*f*).

" When the seller of goods has a *voidable* title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title " (*g*).

" Where goods have been *stolen* and the offender is prosecuted to conviction, the property in the goods so stolen *revests* in the person who was the owner of the goods, or his representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise " (*h*). But " where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender " (*i*).

" Where a person, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by any mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, [or under any agreement for sale, pledge, or other disposition thereof (*k*)] to any person receiving the same in good faith and without notice of the previous

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(*e*) See cases cited in note (*c*). An auction room is not a shop (*Clayton* v. *Le Roy* (*ubi supra*)).

(*f*) *Crane* v. *London Docks Co.*, 5 B. & S. 313; 33 L. J. Q. B. 224.

(*g*) S. 23. See *ante*, p. 96; see also *Whitehorn Brothers* v. *Davison*, [1911] 1 K. B. 463; 80 L. J. K. B. 425; 104 L. T. 234. If the buyer has acquired a good title to the goods, he can pass that good title even to a purchaser who has notice of the original vendor's defect of title (*Peirce* v. *London, etc., Repository*, [1922] W. N. 170).

(*h*) S. 24 (1). By a sale in market overt the property passes to the purchaser, who, until by the conviction it *revests* in the original owner, is the owner of the goods, and is therefore not liable to any action in respect of his dealings with them during the intervening time (*Horwood* v. *Smith*, 2 T. R. 750). By s. 6 of the Criminal Appeal Act, 1907, the revesting is suspended (unless the Court otherwise directs) for ten days after the conviction and also pending any appeal. The Court may also annul or vary any order for restitution (as to which, see s. 45 of the Larceny Act, 1916), although the conviction is not quashed.

(*i*) S. 24 (2), re-enacted by s. 45 of the Larceny Act, 1916, with the alteration of the word " larceny " to " stealing."

(*k*) These words in this and the next sub-section are contained in ss. 8 and 9 of the Factors Act, 1889, which are otherwise in the same language, and were not repealed by the Sale of Goods Act.

sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same" (*l*).

"Where a person, having *bought or agreed to buy* goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, [*or under any agreement for sale, pledge, or other disposition thereof*], to a person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner" (*m*).

This last sub-section has been frequently considered with regard to hire-purchase agreements, and the effect of the decisions thereon is as follows: If the agreement is one under which the hire-purchaser is under a *legal obligation* to make *all* the weekly or monthly payments stipulated for by the agreement, he is a person who has "agreed to buy" goods and, even before he has actually made all the payments, he can give a good title to an innocent purchaser or pledgee (*n*). If, however, the agreement is in effect a contract for the *hire* of goods, containing a stipulation that *if* the hire-purchaser makes a certain number of payments the property in the goods shall pass to him, but giving him the right at any time to determine the agreement by redelivery of the goods, so that he has merely an option to purchase, he is not a person who has "agreed to buy," and cannot give a good title to an innocent purchaser or pledgee (*o*).

(*l*) S. 25 (1).

(*m*) S. 25 (2). A conditional agreement to buy is within this sub-section, *e.g.*, an agreement by A to buy goods subject to the approval of his solicitor (*Marten* v. *Whale*, [1917] 2 K. B. 480; 86 L. J. K. B. 1305; 117 L. T. 137).

(*n*) *Lee* v. *Butler*, [1893] 2 Q. B. 318; 62 L. J. Q. B. 591; 69 L. T. 370. This is so, even though the contract contains provisions under which it may on certain contingencies be determined by the owner (*Hull Ropes Co.* v. *Adams*, 65 L. J. Q. B. 114; 73 L. T. 446).

(*o*) *Helby* v. *Matthews*, [1895] A. C. 471; 64 L. J. Q. B. 465; 72 L. T. 841. See also *Belsize Motor Supply Co.* v. *Cox*, [1914] 1 K. B. 244; 83 L. J. K. B. 261; 110 L. T. 151.

The words " mercantile agent " in the previous section have the same meaning as in the *Factors Act*, 1889 (*p*), which amended and consolidated the Factors Acts of 1823, 1825, and 1842. At Common Law, as already pointed out, the owner of goods might be bound by a sale made by a person whom he had held out as having authority to sell them. But it was held that the mere fact that an agent was entrusted with the possession of goods or documents of title to goods did not amount to a holding out so as to enable him to dispose of the goods in a manner contrary to his actual instructions. This, however, is no longer the law with regard to *mercantile* agents, nor, as we have seen, with regard to sellers in possession after sale and buyers who have obtained possession.

By the *Factors Act*, 1889 (*q*), a " mercantile agent " is defined as a " mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods " (*r*). The expression " *document of title* " includes any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented.

" Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice

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(*p*) S. 25 (3).

(*q*) 52 & 53 Vict. c. 45, s. 1 (1) (4).

(*r*) As to who is a mercantile agent, see *Oppenheimer* v. *Frazer & Wyatt*, [1907] 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 23 T. L. R. 410; *Weiner* v. *Harris*, [1910] 1 K. B. 285; 79 L. J. K. B. 342; 101 L. T. 647; 26 T. L. R. 96; *Lowther* v. *Harris*, [1927] 1 K. B. 393; 96 L. J. K. B. 170. The Act does not apply to a mere servant or shopman ([1927] 1 K. B., at p. 398).

that the person making the disposition has not authority to make the same" (*s*). The same rule applies even though the consent of the owner has determined, provided that the person taking under the disposition has not at the time thereof notice of its determination (*t*).

If a mercantile agent is in fact in possession of goods with the consent of the owner it is, for the purposes of the Act, immaterial that the consent was obtained by fraud or false pretences, or even by larceny by a trick, unless the trick was of such a nature that the consent was merely apparent and not real as, for instance, if the owner was deceived as to the identity of the person with whom he has dealing (*u*).

Where, however, a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*x*).

Effect of writs of execution.—A writ of execution against goods binds the property in the goods from the time when it is delivered to the sheriff to be executed, but does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless at the time when he acquired his title he had notice that such writ or any other writ by virtue of which the goods might be seized had been delivered to, and remained unexecuted in the hands of, the sheriff (*y*).

In *bankruptcy* the title of the trustee *relates back* to the first act of bankruptcy committed by the bankrupt within the three months preceding the date of the presentation of the petition (*z*).

(*s*) *Id.*, s. 2 (1). See *Oppenheimer* v. *Frazer & Wyatt*, [1907] 2 K. B. 50; 76 L. J. K. B. 806; *Oppenheimer* v. *Attenborough*, [1908] 1 K. B. 221; 77 L. J. K. B. 209. A person is in "possession," though the actual custody of the goods, etc., is held by some other person, subject to his control or for him or on his behalf (s. 1 (2)).

(*t*) S. 2 (2).

(*u*) *Folkes* v. *King*, [1923] 1 K. B. 282; 92 L. J. K. B. 125; 128 L. T. 405; 39 T. L. R. 77. That is to say, in the case of larceny by a trick, a mercantile agent may, for the purposes of this Act, be in possession with the consent of the owner, although, for the purposes of the criminal law, he is in possession against the will of the owner. It has been held, however, that this rule does not apply to s. 21 (1) of the Sale of Goods Act, see *Heap* v. *Motorists'*, *etc.*, *Agency*, *ante*, p. 358, n. (*y*).

(*x*) *Id.*, s. 4.

(*y*) Sale of Goods Act, 1893, s. 26.

(*z*) Bankruptcy Act, 1914, s. 37; and as to fraudulent preferences, see s. 44.

But a sale or transfer of property by a person who subsequently becomes bankrupt is not avoided by the bankruptcy if made (i) before the receiving order; and (ii) before the purchaser had notice of any available act of bankruptcy (*a*). Goods which by the consent of the true owner are in the possession of a vendor or purchaser in his trade or business, and under such circumstances that he is the "reputed owner" thereof, will, however, pass to the trustee in bankruptcy (*b*). A purchase from a bankrupt of goods acquired by him after his adjudication is valid against the trustee in bankruptcy if made *bona fide* and for value and before any intervention by the trustee (*c*).

Performance of the Contract.—"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them *in accordance with the terms of the contract of sale* (*d*). Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods" (*e*).

"Whether it is for the buyer to take possession of the goods, or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and, if not, his residence: provided that if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery. . . . Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods" (*f*).

(*a*) Bankruptcy Act, 1914, s. 45. (*b*) *Id.*, s. 38 (c).

(*c*) *Id.*, s. 47. See also s. 4 of the Bankruptcy Act, 1926.

(*d*) S. 27. Delivery means the voluntary transfer of possession from one person to another (s. 62), and may be actual or constructive.

(*e*) S. 28.

(*f*) S. 29 (1) (3). Where, under a contract of sale the seller of goods is

" Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.—Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole: if the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.—Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole " (*g*). But " the provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties " (*h*). " Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments " (*i*).

Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable

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directed to deliver them at the buyer's premises, he discharges his obligations if he delivers them there without negligence to a person apparently having authority to receive them (*Galbraith & Grant, Ltd.* v. *Block*, [1922] 2 K. B. 155; 91 L. J. K. B. 649; 127 L. T. 521; 38 T. L. R. 669). Where the seller is bound to send goods to the buyer, but no time for sending is fixed, he must send within a reasonable time, which is a question of fact (s. 29), and, unless otherwise agreed, must bear the expenses of putting the goods in a deliverable state (*id.*, s. 29 (5)). Demand or tender of delivery must be at a reasonable hour, which is a question of fact (*id.*, sub-s. (4)). By s. 62 the expression " document of title to goods " has the same meaning as in the Factors Act (*ante*, p. 361).

(*g*) S. 30 (1) (2) (3). " Mixed with " includes " accompanied by," and " description " may include the method of packing (*Re Moore & Co. and Landauer & Co.*, [1921] 1 K. B. 519; 90 L. J. K. B. 731; 125 L. T. 372; 37 T. L. R. 452).

(*h*) S. 30 (4). A seller may protect himself by contracting to sell " about " so many tons, etc., or so many tons " more or less."

(*i*) S. 31 (1).

breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated (*k*).

"Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be a delivery of the goods to the buyer.—Unless otherwise authorised by the buyer, the seller must make such contract with the carrier *on behalf of the buyer* as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages" (*l*).

The ordinary rules as to delivery to a carrier under a contract of sale are that (i) it is a delivery to the buyer which, provided that the goods are in conformity with the contract, passes to him the property and the risk if they have not already passed; (ii) the contract of carriage is made with the carrier by the vendor as agent for the purchaser; (iii) the carrier is the agent for the purchaser, who is therefore the proper person to sue him for non-delivery of or damage to the goods. But these are only *prima facie* rules, which may be varied in many ways. Thus the goods may be delivered to a carrier as agent for the vendor, or the vendor may expressly contract to deliver the goods at a particular place, in which case his contract is not performed until the goods have reached their destination (*m*).

"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit" (*n*).

(*k*) S. 31 (2). See *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 453; 74 L. J. K. B. 688; 92 L. T. 637; 21 T. L. R. 413; *Payzu, Ltd.* v. *Saunders*, [1919] 2 K. B. 581; 35 T. L. R. 657. (*l*) S. 32 (1) (2).

(*m*) See *Dunlop* v. *Lambert*, 6 Cl. & Fin. 603; 49 R. R. 143; *Calcutta Co.* v. *De Mattos*, 32 L. J. Q. B. 322; and as to delivery to a carrier as agent for the vendor, s. 19 (2), *ante*, p. 356.

(*n*) S. 32 (3). This sub-section does not apply to c.i.f. contracts, that is to say, where goods are sold at a price to cover cost, insurance and

" Where the seller of goods agrees to deliver them, at his own risk, at a place other than that where they are when sold, the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit " (*o*).

" Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity for examining them for the purpose of ascertaining whether they are in conformity with the contract.—Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract " (*p*).

" The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller,

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freight. Under a c.i.f. contract the vendor, in the absence of any special provision to the contrary, is bound (i) to make out an invoice of the goods sold; (ii) to ship at the port of shipment goods of the description contained in the contract; (iii) to procure *on shipment* a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract; (iv) to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; (v) with all reasonable dispatch to send forward and tender to the buyer these shipping documents—namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of the price. If no place be named in the contract for the tender of the shipping documents they must *prima facie* be tendered at the residence or place of business of the buyer (*Johnson* v. *Taylor Brothers & Co., Ltd.*, [1920] A. C., at pp. 155, 156; 89 L. J. K. B. 227; 122 L. T. 130; 36 T. L. R. 62; *Hansson* v. *Hamel & Horley*, 91 L. J. K. B. 433; 127 L. T. 74; 38 T. L. R. 466). Nor does the sub-section apply to an " ex ship " contract. " In the case of a sale ' ex ship ' the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein, which is usual for the delivery of the goods of the kind in question. The seller has therefore to pay the freight, or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods " (*Yangtsze Insurance Association* v. *Lukmanjee*, [1918] A. C., at p. 589; 87 L. J. P. C. 111; 118 L. T. 736; 34 T. L. R. 320). But the sub-section applies ordinarily to f.o.b. (free on board) contracts, under which the seller is bound to deliver the goods on board ship at his own expense, the risk thereafter passing to the buyer (*Inglis* v. *Stock*, 10 A. C. 263; 54 L. J. Q. B. 542; 52 L. T. 821).

(*o*) S. 33.

(*p*) S. 34 (1) (2).

or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them " (*q*).

The acceptance to which this section refers is acceptance of the goods *in performance of the contract* as distinct from the acceptance in recognition of the contract which is required by s. 4. Acceptance in this sense is material only when there is a right to reject the goods as not being in accordance with the contract.

" Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, *having the right so to do*, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them " (*r*).

" When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract " (*s*).

Rights of Unpaid Seller against the Goods.—Irrespective of the rights of an unpaid seller by action, he has also the following rights (*t*):—

1. If the property has passed to the buyer (a) a *lien* on the goods for the price *while he is in possession* of them, (b) in case of the *insolvency* of the buyer a right of *stopping the goods in*

(*q*) S. 35. Where a buyer resells some of the goods and delivers them to the sub-purchaser he does an act which is inconsistent with the ownership of the original seller, and accordingly loses his right of rejecting, even though he had no knowledge that the goods were not in accordance with the contract, and the reasonable time for examining them which is allowed by s. 34 had not expired (*Hardy & Co.* v. *Hillens & Fowler*, [1923] 2 K. B. 490; 92 L. J. K. B. 930; 129 L. T. 674; 39 T. L. R. 547; see also *Benaim & Co.* v. *Debono*, [1924] A. C. 514; 93 L. J. P. C. 133; 131 L. T. 1).

(*r*) S. 36.

(*s*) S. 37.

(*t*) See s. 39 (1) (2). By s. 38 a seller is an " unpaid seller " (a) when the whole of the price has not been paid, and (b) when a negotiable instrument has been received as conditional payment and has not been duly met.

transitu after he has parted with the possession, (c) a right of resale.

2. If the property has not passed he has a right of withholding delivery.

The lien arises—

(a) "Where the goods have been sold without any stipulation as to credit;

(b) When the goods have been sold on credit but the term of credit has expired;

(c) When the buyer becomes insolvent.

The seller may exercise his right of lien, notwithstanding that he is in possession of the goods as agent or bailee for the buyer" (*u*). "Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien" (*x*).

The *lien is lost* by the unpaid seller—

(a) "When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer, without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof" (*y*).

But it is not lost merely by obtaining judgment for the price of the goods (*z*).

Stoppage in transitu.—After the unpaid seller has parted with the possession of the goods, he nevertheless has the right, *if the buyer becomes insolvent*, of resuming possession of them so long as they are in course of transit to the buyer, and of then retaining them until payment of the price. The following rules are laid down by the Act (*a*):—

1. Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until

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(*u*) S. 41.
(*x*) S. 42.
(*y*) S. 43 (1). As to reserving the right of disposal, see s. 19, *ante*, p. 356.
(*z*) S. 43 (2).
(*a*) S. 45.

the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee.

2. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

3. If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer (*b*).

4. If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

5. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case whether they are in the possession of the master as a carrier, or as agent to the buyer (*c*).

6. Where the carrier, or other bailee, wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

7. Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods

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(*b*) Goods are *in transitu* while, for the purposes of transmission under the contract, they are in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired, possession. If the vendor has reserved the right of disposal, the carrier is his agent, and he still has possession (*Schotsmans* v. *Lancashire and Yorkshire Railway*, L. R. 2 Ch., at p. 335; 36 L. J. Ch. 361; 16 L. T. 189). If the carrier has agreed to hold them exclusively for the buyer, he is the agent of the buyer, who thus has possession (sub-s. (3) above). To be *in transitu* the goods must be in the hands of the carrier as such, and for the purposes of the transit (*Lyons* v. *Hoffnung*, 15 A. C., at p. 397; 59 L. J. P. C. 79; 63 L. T. 293). The goods need not be in motion; it is sufficient if they are in any place of deposit connected with the transmission (*Kendall* v. *Marshall, Stevens & Co.*, 11 Q. B. D., at p. 365; 52 L. J. Q. B. 313; 48 L. T. 951). The words "appointed destination" mean the destination appointed between seller and buyer by the contract, on reaching which the goods will not be set in motion again without new orders from the purchaser to the carrier (compare *Ex p. Miles*, 15 Q. B. D. 39; 54 L. J. Q. B. 566, with *Bethell* v. *Clark*, 20 Q. B. D. 615; 57 L. J. Q. B. 302; 59 L. T. 808).

(*c*) The test is whether the master is the servant of the owner or charterer (*ante*, p. 318).

may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

"The unpaid seller may exercise his right of stoppage *in transitu*, either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer. When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller" (*d*).

Subject to s. 25 (2) of the Act (*e*), "the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that, where a *document of title* to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage *in transitu* can only be exercised subject to the rights of the transferee" (*f*).

A contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage *in transitu*. But where an unpaid seller who has exercised either right resells the goods, the buyer acquires a good title as against the original

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(*d*) S. 46 (1) (2). Where notice is given to a shipowner, it is his duty to transmit it with reasonable diligence to the master of the ship (*Kemp* v. *Falk*, 7 A. C., at p. 585; 52 L. J. Ch. 167; 47 L. T. 454).

(*e*) *Ante*, p. 360.

(*f*) S. 47.

buyer. Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract. Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages (*g*).

Actions for Breach of the Contract.—" Where, under a contract of sale, the *property in the goods has passed* to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the *price* of the goods. Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract " (*h*).

Where there is a wrongful neglect or refusal by the buyer to accept and pay for the goods, or by the seller to deliver the goods to the buyer, the other party may maintain an action for non-acceptance or non-delivery. The measure of damages is " the estimated loss directly and naturally resulting, in the ordinary course of events " from the buyer's or seller's breach of contract. Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been accepted or delivered, or, if no time was fixed, then at the time of the refusal to accept or deliver (*i*).

(*g*) S. 48.

(*h*) S. 49 (1) (2). As to sub-s. (2), see *Stein, Forbes & Co.* v. *County Tailoring Co.*, 115 L. T. 215.

(*i*) Ss. 50 (buyer), 51 (seller). This rule as to the measure of damages does not apply to an anticipatory breach by repudiation of the contract before the time of performance. In such a case the damages must be fixed by reference to the time of performance, subject, however, to abatement, if there were

Subject to ss. 25 and 47 of the Act (*k*), where the property in the goods has passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer will have an action of detinue against him or any other person in possession of the goods, and may also have an action for conversion against the seller or a third person (*l*).

" Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price, (b) maintain an action against the seller for damages for the breach of warranty." The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the case of breach of warranty of quality, such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they answered to the warranty. " The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage " (*m*).

" Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed " (*n*).

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any circumstances which would have afforded a reasonable opportunity of mitigating the loss (*Millet* v. *Van Heek & Co.*, [1921] 2 K. B. 369; 90 L. J. K. B. 671; 125 L. T. 51; 37 T. L. R. 411).

(*k*) *Ante*, pp. 360, 370. (*l*) *Post*, Part III., Chapter I.

(*m*) S. 53 (1) (2) (3) (4).

(*n*) S. 54. As to interest and special damages, see *ante*, pp. 195, 198. As to what special damages are too remote, see *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725; 73 L. J. K. B. 524; 91 L. T. 629; 20 T. L. R. 342. Here the defendants contracted to sell sulphuric acid free from arsenic. The purchasers, who did not make known the purpose for which they required it, used the acid to make glucose, which they sold to brewers. The sulphuric acid contained arsenic, which spoilt the glucose made by the purchasers and the beer made by the brewers, who in consequence sued the purchasers and recovered damages from them. In an action by the purchasers against the vendors it was held that they could recover (i) the price of

Specific performance.—" In any action for breach of contract to deliver *specific or ascertained* goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment may be unconditional, or upon such terms as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment " (*o*).

Auction Sales.—" In the case of a sale by auction—

1. Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

2. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid:

3. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer:

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the acid, (ii) the value of the materials spoilt in making glucose, but not (iii) the damages paid to the brewers (because they had not communicated the purpose for which they required the acid), nor (iv) damages for injury to the goodwill of their business, which did not arise from the act of the defendants, but from their own act in selling the glucose to the brewers. It may further be noted that, in an action for damages for breach of warranty, being an action for breach of contract, damages may be claimed in respect of the death of a human being, though this would not be possible in an action of tort, except under the Fatal Accidents Act, 1846. Thus, in the case of *Jackson* v. *Watson & Sons*, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454, it was expressly held that a husband whose wife had been poisoned by tinned salmon could claim damages for expenses to which he had been put by the loss of services. Similar damages had been allowed in the earlier case of *Frost* v. *Aylesbury Dairy Co.* (*ante*, p. 351), where, however, this point was not raised.

(*o*) S. 52. See *Re Waite* (*ante*, p. 354, n. (*i*)). Under this section specific performance may be ordered of a contract for the sale of a ship, see *Behnke* v. *Bede S.S. Co.* (*ante*, p. 342 n (c)).

4. A sale by auction may be notified to be subject to a reserved price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction " (*p*).

Exclusion of Implied Terms.—A very important rule is stated in s. 55 of the Act, which provides that " Where any right, duty, or liability would arise under a contract of sale, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract " (*q*).

SECTION 2.—*Lien. Pledges and Mortgages of Goods.*

Lien.—A Common Law *possessory* lien is the right in one man to *retain in his possession* goods belonging to another until certain demands of his against the owner have been satisfied (*r*). It depends entirely upon possession and lasts only while the creditor has continuous possession (*s*), and must therefore be distinguished from an equitable lien (*t*), which is a right given to creditors to have certain specific property applied in satisfaction of their demands, and which do not depend upon possession. The right of lien is one which is given by law (*u*) in two classes of cases:—

(*p*) S. 58. Where goods are offered by auction subject to a reserve price, each bid is a conditional bid subject to the price offered reaching the reserve price, and the fall of the hammer is an acceptance of that conditional offer. Where, therefore, an auctioneer by mistake knocked down a lot to a purchaser who had not bid the reserve price, and, discovering his mistake, refused to sign a memorandum of the contract, it was held that no action lay against him either for not completing the contract or for breach of warranty of authority (*McManus* v. *Fortescue & Branson*, [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292).

(*q*) See, *e.g.*, *Cointat* v. *Myham*, [1913] 2 K. B. 220; 84 L. J. K. B. 2253; 110 L. T. 749; 30 T. L. R. 282, where on a sale of meat in Smithfield Market evidence was admitted to show that, by the usage of the market, no warranty as to its fitness was implied.

(*r*) *Hammonds* v. *Barclay*, 2 East, at p. 235. Auctioneers and factors have also a lien on the price of goods sold by them (*Robinson* v. *Rutter*, 4 E. & B. 954; 24 L. J. Q. B. 250; 99 R. R. 849).

(*s*) *Sweet* v. *Pym*, 1 East, 4; 5 R. R. 497; *Forth* v. *Simpson*, 13 A. & E. 680; 18 L. J. Q. B. 263; 78 R. R. 496.

(*t*) Wilshere's Equity, Chapter IV, s. 2.

(*u*) *Re Leith's Estate*, *Chambers* v. *Davidson*, L. R. 1 P. C., at p. 305; 36 L. J. P. C. 17.

i. To persons who are under a Common Law duty to render services, as, *e.g.*, carriers and innkeepers (*x*).

ii. To persons rendering services, spending money, skill, or labour, on the property of another person employing them for that purpose, as, *e.g.*, all agents (*y*) and artificers (*z*).

The right may be excluded by express agreement or the course of dealing between the parties (*a*). Thus, it does not exist if the goods are received under a special agreement (*b*) or for a special purpose (*c*) inconsistent with its existence. So also, it may by agreement be enlarged into a general lien (*d*).

A lien may be (i) *particular*, *i.e.*, the right to retain goods until demands in respect of those particular goods are satisfied; or (ii) *general*, *i.e.*, the right to retain goods against a general balance due from the debtor. A general lien can exist only by law, as in the case of innkeepers (*e*), or by express agreement, or by a custom so well established as to amount to an implied term of the contract (*f*). Such a custom exists in the case of factors (*g*), wharfingers (*h*), packers (*i*), stockbrokers and bankers (*k*), solicitors (*l*) and insurance brokers (*m*).

(*x*) *Ante*, Part II, Chapter III.

(*y*) *Ante*, p. 222.

(*z*) See *Scarfe* v. *Morgan*, 4 M. & W. 270.

(*a*) *Re Leith's Estate* (*ubi supra*); *Fisher* v. *Smith*, 4 A. C. 1; 48 L. J. Ex. 411; 39 L. T. 430.

(*b*) *Re Bowes*, 33 Ch. D. 586; 56 L. J. Ch. 143; 55 L. T. 260; *Bock* v. *Gorrissen*, 30 L. J. Ch. 39; 3 L. T. 424.

(*c*) *Brandao* v. *Barnett*, 12 Cl. & F. 787; 69 R. R. 204.

(*d*) *Wiltshire* v. *Great Western Railway*, L. R. 6 Q. B. 776; 40 L. J. Q. B. 308; 23 L. T. 666.

(*e*) *Mulliner* v. *Florence*, 3 Q. B. D. 484; 47 L. J. Q. B. 700; 38 L. T. 167.

(*f*) *Holderness* v. *Collinson*, 7 B. & C. 212; 6 L. J. K. B. 17; 31 R. R. 174; *Bock* v. *Gorrissen* (*ubi supra*).

(*g*) *Baring* v. *Corrie*, 2 B. & Ald., at p. 148; 20 R. R. 383; *Stevens* v. *Biller*, 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36.

(*h*) *Naylor* v. *Mangles*, 1 Esp. 109; 5 R. R. 722; *Spears* v. *Hartley*, 3 Esp. 81; 6 R. R. 814. The lien is for wharfage only, not for other charges (*Holderness* v. *Collinson* (*ubi supra*)).

(*i*) *Re Witt*, 2 Ch. D. 489; 45 L. J. Bk. 118.

(*k*) *Re London and Globe Finance Corporation*, [1902] 2 Ch. 416; 71 L. J. Ch. 893; 87 L. T. 49; 18 T. L. R. 679; *Brandao* v. *Barnett*, 12 Cl. & F. 787 (bankers).

(*l*) *Ante*, p. 252.

(*m*) *Snook* v. *Davidson*, 2 Camp. 218; 11 R. R. 696; *Mann* v. *Forrester*, 4 Camp. 60; 15 R. R. 724; and see *Hewison* v. *Guthrie*, 2 Bing. (N.C.) 755; 5 L. J. C. P. 283; 42 R. R. 720.

A lien exists only in respect of goods received rightfully (*n*), and from the owner (*o*) or some person who had authority to give possession of them in order that work might be done upon them (*p*).

The right is personal and cannot be transferred (*q*). It is a right merely to retain possession and not to make any charges in respect of keep or warehousing (*r*), nor, apart from statute, to sell the goods (*s*).

The right of lien is lost—

i. By any discharge of the debt. It is suspended by taking a negotiable instrument as payment, but unless it is taken as absolute satisfaction the debt will revive on its dishonour, even though it is in the hands of assignees for value (*t*).

ii. By tender of the debt (*u*).

iii. By taking security for the debt under circumstances inconsistent with its continued existence (*x*).

(*n*) *Madden* v. *Kempster*, 1 Camp. 12.

(*o*) *Buxton* v. *Baughan*, 6 C. & P. 674; 40 R. R. 842.

(*p*) The hirer of a chattel is entitled, without any express authority from the owner, to have it repaired so as to enable him to use it in the way in which such a chattel is ordinarily used, and the repairer will have a lien for his charges against the owner (*Green* v. *All Motors, Ltd.*, [1917] 1 K. B. 625; 86 L. J. K. B. 590; 116 L. T. 189, where the cases on this point are collected). Where, however, goods are delivered by the owner to A in order that he may do certain work upon them, and A delivers the goods to B to do part of work under a sub-contract, no right of lien can be created in favour of B as against the owner, except by his express or implied authority or by a custom of the trade (*Pennington* v. *Reliance Motor Works, Ltd.*, [1923] 1 K. B. 127; 92 L. J. K. B. 202; 128 L. T. 384; 38 T. L. R. 670; see also *Cassels & Co.* v. *Holden Wood, etc., Co., Ltd.*, 84 L. J. K. B. 834; 112 L. T. 373).

(*q*) *Donald* v. *Suckling*, L. R. 1 Q. B., at p. 612; 35 L. J. Q. B. 232; 14 L. T. 722.

(*r*) *Somes* v. *British Empire Shipping Co.*, 8 H. L. C. 338; 30 L. J. Q. B. 229.

(*s*) *Thames Ironworks Co.* v. *Patent Derrick Co.*, 29 L. J. Ch. 714; *Mulliner* v. *Florence*, 3 Q. B. D., at p. 489; 47 L. J. Q. B. 700 (a case decided before the Innkeepers Act, 1878). A statutory right of sale now exists in the case of innkeepers (*ante*, p. 304), and cases within sections 492—501 of the Merchant Shipping Act, 1894 (*ante*, p. 330).

(*t*) *Gunn* v. *Bolckow, Vaughan & Co.*, 10 Ch. D. 491; 44 L. J. Ch. 732.

(*u*) *Lilley* v. *Barnsley*, 1 C. & K. 344; 70 R. R. 803; *Kerford* v. *Mondel*, 28 L. J. Ex. 303.

(*x*) *Angus* v. *McLachlan*, 52 L. J. Ch. 587; 23 Ch. D. 330; 48 L. T. 863; *Re Taylor, Stillman, and Underwood*, [1891] 1 Ch., at p. 597; 60 L. J. Ch. 525; 64 L. T. 605; *Re Douglas, Norman & Co.*, [1898] 1 Ch. 199; 67 L. J. Ch. 85; 77 L. T. 552. Where a solicitor takes from his client a security for his costs, the inference, in the absence of evidence to the contrary, is that he has waived his lien (*id.*).

iv. By re-delivery of the goods to the owner or his agent (*y*).

Pledge.—A pledge or pawn is constituted by the delivery of the actual or constructive *possession* of a chattel as security for a debt (*z*). The delivery gives to the pledgee a "special property" in the goods, the general property remaining in the pledgor: by virtue of this special property the pledgee has at Common Law an authority to sell the goods on the default of the pledgor to repay the money, either at the time originally appointed, or after notice by the pledgee (*a*). If, however, the pledgee sells he does so by virtue and to the extent of the pledgor's ownership, and not with a new title of his own; he must appropriate the proceeds of the sale, which are the pledgor's money, to the payment of the debt, and must account to the pledgor for any surplus after paying the debt: he must take care that the sale is a provident sale, and if the goods are in bulk, he must not sell more than is reasonably sufficient to pay off the debt (*b*). If it does not produce sufficient to pay the debt, he may sue for the deficiency (*c*). The pledgee may also sub-pledge the chattel to the extent of his interest (*d*).

The rights of the pledgee are extinguished:—

i. By tender of the debt, after which, if the pledgee

(*y*) See *Pennington* v. *Reliance Motor Works, Ltd.* (*ubi supra*).

(*z*) Anything of which possession can be transferred may be pledged, as, *e.g.*, a debenture (*Donald* v. *Suckling* (*infra*)) or a negotiable instrument (*London Joint Stock Bank* v. *Simmons*, [1892] A. C. 201; 61 L. J. Ch. 723); or a bill of lading (*Re David Allester*, [1922] 2 Ch. 211; 91 L. J. Ch. 797; 127 L. T. 434; 38 T. L. R. 611).

(*a*) *Ex p. Hubbard*, 17 Q. B. D. 690; 55 L. J. Q. B. 490; 59 L. T. 172; *Stubbs* v. *Slater*, [1910] 1 Ch., at p. 639; 79 L. J. Ch. 420; 102 L. T. 444.

(*b*) *The Odessa*, [1916] 1 A. C., at p. 159; 85 L. J. P. C. 49; 114 L. T. 10; 32 T. L. R. 103. In this case it was pointed out that the term "special property" is incorrect; the pledgee has no *property*, but merely a special interest. His rights arise merely out of the *possession* which is given to him (*Re Morritt*, 18 Q. B. D., at p. 232; 56 L. J. Q. B. 139; 56 L. T. 42), which also enables him to maintain an action of detinue or conversion in respect of the goods (*Swire* v. *Leach*, 18 C. B. (N.S.) 479; 34 L. J. C. P. 150; 11 L. T. 680; 144 R. R. 579).

(*c*) *Jones* v. *Marshall*, 24 Q. B. D. 269; 59 L. J. Q. B. 123; 61 L. T. 721. This applies also to a pawnbroker who has made a special contract under s. 24 of the Pawnbrokers Act, 1872 (*id.*).

(*d*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585; 35 L. J. Q. B. 232; 14 L. T. 772, where the difference between lien and pledge is explained in detail. The pledgee has no right of foreclosure (*Carter* v. *Wake*, 4 Ch. D. 605; 46 L. J. Ch. 841; *Stubbs* v. *Slater* (*ubi supra*).

refuses or fails to re-deliver the goods, he can be sued in detinue or conversion (*e*).

ii. By payment of the amount due, with interest (*f*). The pledgor has the right to redeem at any time before sale, even though the time fixed for payment has expired (*g*).

iii. By re-delivery to the pledgor, unless for a limited purpose only (*h*).

Pawnbrokers.—A pledge to a pawnbroker for *less than* £10 is governed by the *Pawnbrokers Acts*, 1872 and 1922 (*i*); to loans above £10 the Common Law rules still apply (*k*). The terms of the contract are fixed by the Acts; but in case of a loan of above 40s. the pawnbroker may make a special contract on a special pawn-ticket, a duplicate of which must be signed by the pawner (*l*).

Every pledge must be redeemed within twelve months from the day of pawning, with seven days of grace, otherwise (i) if the loan does not exceed 10s., it becomes the absolute property of the pawnbroker; and (ii) if the loan is above 10s., it remains redeemable until actual sale (*m*). A pledge pawned for above 10s. must be by public auction, at which the auctioneer may bid and purchase, then becoming absolute owner; but at any time within three years after the auction the holder of the pawn-ticket may inspect the entry of the sale in the pawnbroker's book, and if the sale realised more than the amount of the loan, with the profit due at the time of sale, the pawnbroker must on demand within the three years pay over the surplus, deducting the costs of the sale (*n*).

(*e*) *Donald* v. *Suckling* (*ubi supra*); *Harper* v. *Godsell*, L. R. 5 Q. B., at p. 428; 39 L. J. Q. B. 185.

(*f*) *Swire* v. *Leach*, 18 C. B. (N.S.), at p. 493.

(*g*) *Re Morritt* (*ubi supra*); *The Ningchow*, [1916] P., at p. 222; 115 L. T. 554.

(*h*) *Reeves* v. *Capper*, 5 Bing. (N.C.) 136; 8 L. J. C. P. 44; 50 R. R. 634; and see *North Western Bank* v. *Poynter*, [1895] A. C., at p. 68; 64 L. J. C. P. 27; 72 L. T. 93; *Re David Allester* (*ubi supra*).

(*i*) By s. 37 of the Act of 1872 every pawnbroker (*i.e.*, person carrying on the business of taking goods and chattels in pawn (s. 5)) must have a licence.

(*k*) Act of 1872, s. 10.

(*l*) *Id.*, s. 24.

(*m*) *Id.*, ss. 17, 18.

(*n*) *Id.*, ss. 19, 21, 22. The pawnbroker merely sells such rights as he

The holder for the time being of a pawn-ticket is presumed to be the person entitled to redeem; and on payment of the loan and profit the pawnbroker must deliver the pledge to the person producing the pawn-ticket, and is indemnified for so doing (*o*). This, however, applies only between the pawnbroker and the pawner, or an owner who has authorised the pledge, and does not affect the Common Law rights of an owner of property which is pledged against his will so as to prevent him from recovering from the pawnbroker the property itself, or its value, if it has been returned to the pawner, who has redeemed it (*p*). When any person is convicted in any Court of stealing or fraudulently obtaining goods, and the same have been pawned, the Court, on proof of the ownership, may order delivery thereof to the owner, either with or without payment to the pawnbroker of all or any part of the loan (*q*).

Where a pledge is destroyed or damaged by fire the pawnbroker is liable, on application within the period during which the pledge would have been redeemable, to pay the value of the pledge after deducting the amount of the loan and profit, the value being the amount of the loan and profit and 25 per cent. on the amount of the loan; and he may insure to the extent of the value so estimated. Where a pledge has been depreciated in value through the fault of the pawnbroker, a Court of summary jurisdiction may award compensation to the owner (*r*).

Mortgages of Chattels.—A mortgage of chattels involves, not the delivery of possession, as in the case of a pledge, but the transfer of *property* as security for a debt, and subject to the right

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himself had (*Morley* v. *Attenborough*, 3 Ex. 500; 18 L. J. Ex. 148; 77 R. R. 709; see *ante*, p. 349). If, therefore, the goods have been unlawfully pledged, a purchaser, including the pawnbroker himself, does not have a title as against the true owner (*Burrows* v. *Barnes*, 82 L. T. 721).

(*o*) *Id.*, s. 25.

(*p*) *Singer Manufacturing Co.* v. *Clark*, 5 Ex. D. 37; 49 L. J. Ex. 224. Conversely, if a pledgee knows that the pledgor is not the owner, and had no authority to pledge, he may return the pledge to the true owner (*Cheesman* v. *Exall*, 6 Ex. 341; see 5 Ex. D., at p. 43; 20 L. J. Ex. 209; 86 R. R. 321).

(*q*) Pawnbrokers Act, 1872, s. 30. The Common Law rights of the owner are not affected by such an order, and he may, instead of complying with the order, sue the pawnbroker for the return of the goods (*Leicester & Co.* v *Cherryman*, [1907] 2 K. B. 101; 76 L. J. K. B. 768).

(*r*) Ss. 27, 28.

of the mortgagor to redeem (*s*). Mortgages of personal chattels are governed by the Bills of Sale Acts, 1878 and 1882, the latter of which has been slightly modified by amending Acts of 1890 and 1891. The Bills of Sale Act, 1878, applies, however, not only to mortgages, but also to absolute transfers of personal chattels.

The Bills of Sale Acts.—A bill of sale is an instrument by which the title to personal chattels is transferred (*t*) from one person (termed the grantor) to another person (termed the grantee) *either absolutely or by way of security for money*. The Act of 1878 was intended to prevent creditors from being defrauded by secret assurances of chattels, which were permitted to remain in the ostensible possession of the person who had parted with them, and applies to both kinds of bills of sale, though, as regards bills of sale given by way of security, it is modified by the Act of 1882. The Act of 1882 was designed to protect borrowers, and applies only to bills of sale given by way of security.

Application of the Acts.—The Acts apply to every bill of sale "whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to *seize or take possession* of any *personal chattels* comprised in or made subject to such bill of sale" (*u*).

Definition of personal chattels (*x*).—This expression includes goods, furniture, and other articles *capable of complete transfer by delivery*, and (when separately assigned or charged) fixtures and growing crops, but not chattel interests in real estate, nor fixtures (except trade machinery as defined by the Act (*y*)) or

(*s*) *Ex p. Hubbard*, 17 Q. B. D., at p. 698; 55 L. J. Q. B. 490; *Re Morritt*, 18 Q. B. D., at p. 232; 56 L. J. Q. B. 139; *Johnson* v. *Diprose*, [1893] 1 Q. B., at p. 517; 62 L. J. Q. B. 291; 68 L. T. 485.

(*t*) *Marsden* v. *Meadows*, 7 Q. B. D., at pp. 84, 85; 50 L. J. Ch. 536; 45 L. T. 301.

(*u*) Bills of Sale Act, 1878, s. 3.

(*x*) *Id.*, s. 4.

(*y*) *Id.*, s. 5. But trade machinery, if affixed to land, passes under a conveyance of the land. Accordingly an assurance of land, including trade machinery (even though expressly mentioned), is not an assurance of personal chattels, unless the trade machinery is assigned by separate words or the assignee has, apart from his powers as grantee of the land, a separate and distinct power to sever it and sell it as something separate and distinct from the land to which it is affixed (*Re Yates*, 38 Ch. D. 112; 57 L. J. Ch. 697; 59 L. T. 47; *Brooke* v. *Brooke*, [1894] 2 Ch. 600; 64 L. J. Ch. 21; 71

growing crops when assigned with any interest in the land or building to which they are affixed or the land on which they grow, nor stock, shares, or *choses in action* (*z*). Fixtures and growing crops are not deemed to be separately assigned or charged when the land passes by the same instrument, merely because they are assigned by separate words or powers to sever them is given (*a*).

Definition of bill of sale.—By s. 4 of the principal Act the expression "bill of sale" includes three classes of documents, *i.e.*, "(i) bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase moneys of goods and *other assurances* of personal chattels, and also (ii) powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also (iii) any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in Equity to any personal chattels, or to any charge or security thereon, shall be conferred"; but it does *not* include assignments for the benefit of creditors (*b*), marriage settlements (*c*), transfers or assignments of any ship or share therein, transfers of goods in the ordinary course of business of any trade or calling (*d*), bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers' certificates, warrants or orders for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising its possessor to transfer or receive the goods thereby represented. The Act of 1890, as amended by the Act of 1891, also excludes certain instruments creating securities on imported goods. A debenture

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L. T. 398; *Small* v. *National Provincial Bank of England*, [1894] 1 Ch. 686; 63 L. J. Ch. 270; 70 L. T. 492). See also *Johns* v. *Ware*, [1899] 1 Ch. 359; 68 L. J. Ch. 155; 80 L. T. 112.

(*z*) Book debts are not chattels within the Acts, but a general assignment of book debts must be registered as an absolute bill of sale under s. 43 of the Bankruptcy Act, 1914.

(*a*) Bills of Sale Act, 1878, s. 7.

(*b*) *I.e.*, for the benefit of all creditors (*Ex p. Salaman*, [1907] 2 K. B. 170; 76 L. J. K. B. 828; 97 L. T. 121). Such assignments are governed by the Deeds of Arrangement Act, 1914.

(*c*) *I.e.*, ante-nuptial settlements or post-nuptial settlements executed in pursuance of an ante-nuptial deed (*Re Reis, ex p. Clough*, [1904] 2 K. B. 769; 73 L. J. K. B. 929; 91 L. T. 352).

(*d*) The expression "goods" includes growing crops (*Stephenson* v. *Thompson*, [1924] 2 K. B. 240; 93 L. J. K. B. 771; 131 L. T. 279; 40 T. L. R. 513).

issued by an incorporated company is not a bill of sale under the Act of 1878 (*e*).

This definition of bills of sale must be read with the previous section, which limits the application of the Act to bills of sale giving power to *seize or take possession* of personal chattels. Neither Act applies where the object and effect of a transaction is immediately to transfer the possession (*f*). As to the three classes of documents comprised in the definition, the following points must be noted:—

i. As to the first class, the word "assurance" qualifies all the preceding words (*g*). The Acts apply only to transactions dependent upon documents, and in which recourse must be had to the document to establish *title* (*h*). The document must be an operative part of the transaction, as distinct from being merely evidence or a record of the transaction (*i*). If there is a transaction which is complete without any document, and under which the grantee gets a title independently of any document, an agreement in writing which merely records the terms of the transaction or regulates the exercise by the grantee of his rights under that independent title is not a bill of sale; but if the document is intended to be part of the transaction by which the grantee gets his title, then, whatever may be its form, even if it is only a receipt, it is a bill of sale (*k*). Thus, where goods had been actually deposited as security for a debt, so that a good Common Law pledge was constituted, a document reciting the transaction, and setting out the conditions under which the pledgee might

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(*e*) *Re Standard Manufacturing Co.*, [1891] 1 Ch. 627; 60 L. J. Ch. 72; 64 L. T. 487. It is also expressly excluded from the Act of 1882 (*id.*, s. 17), but it must be registered under s. 93 (1) of the Companies (Consolidation) Act, 1908.

(*f*) *Ex p. Close*, 14 Q. B. D., at p. 393; 54 L. J. Q. B. 43; 51 L. T. 795; *Ramsay* v. *Margrett*, [1894] 2 Q. B., at p. 26; 63 L. J. Q. B. 513; 70 L. T. 788.

(*g*) *North Central Wagon Co.* v. *Manchester, etc., Railway*, 35 Ch. D., at p. 213; 56 L. J. Ch. 609; 56 L. T. 755. Affirmed, 13 A. C. 554; 58 L. J. Ch. 219; 59 L. T. 730.

(*h*) *Ramsay* v. *Margrett* (*ubi supra*); *Charlesworth* v. *Mills*, [1892] A. C., at p. 242; 66 L. T. 690; 61 L. J. Q. B. 830.

(*i*) *Charlesworth* v. *Mills*, [1892] A. C., at p. 239.

(*k*) *Ibid.*, and see *Ramsay* v. *Margrett* (*ubi supra*). Where there is merely a contractual right to obtain possession, and that right can be justified only by an agreement in writing, then the agreement is a bill of sale (*Great Eastern Railway* v. *Lord's Trustee*, [1909] A. C., at pp. 116, 117; 77 L. J. K. B. 611; 98 L. T. 910; 24 T. L. R. 470).

sell the goods, was held not to be a bill of sale, because the pledgee had a good title independently of the document, which merely recorded a completed transaction under which he had actually taken possession, and regulated the exercise of his legal rights under a title already acquired (*l*). But where a person who has advanced money on the security of goods does not get either actual or constructive possession, but gets merely a document called a " warrant " (not being one of the instruments excepted by the definition) describing the goods and stating that they are deliverable to him or his assigns, such document is a bill of sale (*m*). So also, if there is a completed sale, a receipt subsequently given is not a bill of sale because it contains an acknowledgment of the sale (*n*). But where a contract for sale is enforceable only by reason of a memorandum in writing containing the terms of the contract, such memorandum is a bill of sale (*o*).

ii. A power of distress in an ordinary tenancy agreement is not within the second class of documents; but tenancy agreements between a brewer and the lessee of a tied house, allowing the former to distrain for the price of goods sold by him to the lessee, have been held to amount to licences to take possession of goods as security for debt (*p*). Any attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given by way of security for any present or future debt, and whereby rent is reserved as a mode of providing for payment of

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(*l*) *Ex p. Hubbard*, 17 Q. B. D. 690; 55 L. J. Q. B. 490. See also *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41; 57 L. J. Q. B. 476; *Wrightson* v. *McArthur & Hutchinsons, Ltd.*, [1921] 2 K. B. 807; 90 L. J. K. B. 842; 125 L. T. 383; 37 T. L. R. 575; *Re David Allester*, [1922] 2 Ch. 211; 91 L. J. Ch. 797; 127 L. T. 434; 38 T. L. R. 611. Thus a pawn-ticket is not a bill of sale (*Dublin City Distillery, Ltd.* v. *Doherty*, [1914] A. C., at p. 855).

(*m*) *Dublin City Distillery, Ltd.* v. *Doherty*, [1914] A. C. 823; 83 L. J. P. C. 265; 111 L. T. 81.

(*n*) *Ramsay* v. *Margrett* (*ubi supra*); and see *Preece* v. *Gilling*, 53 L T. 763; *Haydon* v. *Brown*, 59 L. T. 330.

(*o*) *Re Roberts*, 36 Ch. D. 196; 56 L. J. Ch. 952; 57 L. T. 79. See also *Re Hood*, 42 W. R. 23; 10 Morell, 231, where the receipt contained the actual contract and was held to be a bill of sale.

(*p*) *Pulbrook* v. *Ashby*, 56 L. J. Q. B. 376; *Stevens* v. *Marston*, 60 L. J. Q. B. 192. By s. 189 of the Law of Property Act, 1925, a power of distress given by way of indemnity against a rent or any part thereof payable in respect of any land, or against the breach of any covenant or condition in relation to land is not, and shall not be deemed ever to have been, a bill of sale within the meaning of the Bills of Sale Acts.

interest on such debt or otherwise for the purpose of the security, is *deemed* a bill of sale of any personal chattels which may be taken under the power of distress; but this does not include a mortgage of any interest in land which the mortgagee, being in possession, shall demise to that mortgagor at a fair and reasonable rent (*q*). A genuine hire-purchase agreement is not a bill of sale merely because the owner of the goods reserves a right to resume possession upon default of payment by the hirer, the Acts referring only to licences to take possession which are given *by the owner* (*r*). But a document which purports to be merely a hire-purchase agreement may amount to a bill of sale if it is part of an agreement for, and is intended to secure, a loan. Thus A, who had contracted to buy a hotel and furniture, applied to B for a loan, which was refused. It was then agreed that B should buy the furniture and let it to A on a hire-purchase agreement, under which the property would not pass to A until all the instalments had been paid, and in default of payment B would have the right to resume possession. It was held that the Court must in every case consider not merely the form of the document, but the true nature of the whole transaction; that the real intent was that the hire-purchase agreement should be a security for a loan; and that it was therefore a bill of sale (*s*).

(*q*) S. 6. The effect of the word "deemed" is that such an instrument is not a bill of sale, but is only to be treated as such for purposes of registration. If unregistered, it is void under s. 8 of the Act of 1878, but not being actually a bill of sale it need not be in the form required by the Act of 1882 (*Green* v. *Marsh*, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442; 66 L. T. 480). It is also only a bill of sale so far as regards personal chattels, which may be seized, and, even if unregistered, is not void for all purposes (*Re Willis, ex p. Kennedy*, 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749). Thus, so far as it creates the relationship of landlord and tenant, it affects merely the land, and is not within the Acts, so that the attornment clause enables the mortgagee, when claiming possession, specially to indorse his writ under Order III, r. 6, as against a tenant holding over after the expiration of his tenancy, and to obtain summary judgment under Order XIV. In a mining lease a power of distress may be given over chattels of the lessee on adjoining mines (*Re Roundwood Colliery Co.*, [1897] 1 Ch. 373; 66 L. J. Ch. 186; 75 L. T. 641). To bring a mortgage within the exception in the latter part of the section there must be a *bona fide* lease by a mortgagee in possession, not a pretended lease for the purpose of obtaining a power of distress as a further security for the interest of the mortgage (*Re Willis, ubi supra*).

(*r*) *Ex p. Crawcour*, 9 Ch. D. 419; 47 L. J. Bk. 94; 39 L. T. 2; *McEntire* v. *Crossley*, [1895] A. C. 457; 64 L. J. P. C. 129; 72 L. T. 731.

(*s*) *Mellor's Trustees* v. *Maas*, [1903] 1 K. B. 226; 72 L. J. K. B. 82; 88 L. T. 50; affirmed [1905] A. C. 102; 74 L. J. K. B. 452; 92 L. T. 371.

iii. The third class of documents includes only those giving merely an equitable as distinct from a legal right (*t*), as, for example, an agreement to execute a bill of sale to secure payment of a debt, in the event of the debt not being paid within a certain time (*u*).

Registration.—The principal rules as to registration and matters relating thereto are in ss. 8—11 and 22 of the Act of 1878, which, as to security bills, are modified by ss. 8, 10, and 15 of the Act of 1882 (*w*).

Every bill of sale must be (i) duly attested, (ii) registered, and (iii) must truly (*x*) set forth the consideration for which it was given (*y*).

In the case of an *absolute* bill of sale the attestation must be by a solicitor, and must state that, before the execution of the bill, he explained the bill to the grantor (*z*). In the case of a

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See also *Beckett* v. *Tower Assets Co.*, [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; 64 L. T. 497; *Johnson* v. *Rees*, 84 L. J. K. B. 1276; 113 L. T. 275.

(*t*) Hence it does not apply to a clause in a building contract providing that all materials brought by the builder upon the land shall become the property of the landowner because, before the materials are brought upon the land, the landowner has no equitable right or interest in them, and as soon as they are brought upon the land, the legal property in them passes to him (*Reeves* v. *Barlow*, 12 Q. B. D. 436; 53 L. J. Q. B. 192; 50 L. T. 782). Any right in respect of chattels to be acquired in the future by the grantor is an equitable right, and future chattels cannot now be assigned by way of security, except under s. 6 (2) of the Act of 1882, or where there is a covenant to replace existing chattels (*Seed* v. *Bradley*, [1894] 1 Q. B. 319; 63 L. J. Q. B. 387; 70 L. T. 214).

(*u*) *Shears & Sons, Ltd.* v. *Jones*, [1922] 2 Ch. 802; 92 L. J. Ch. 28; 128 L. T. 218.

(*w*) As to local registration, see *post*, p. 386.

(*x*) The word "truly" is contained only in s. 8 of the Act of 1882.

(*y*) S. 8 (1878); s. 8 (1882). The decisions upon "consideration" are very numerous. The general principle is that the facts must be stated with substantial accuracy "either as to their legal effect or as to their mercantile or business effect" (see *Richardson* v. *Harris*, 22 Q. B. D., at p. 271). An important matter to be remembered is that money retained by the grantee for interest or expenses connected with the transaction must not be described as paid to the grantor, though money retained with the consent of the grantor in satisfaction of a debt independent of the transaction may be so described, provided that it is an existing debt and not a future debt or liability (*Ex p. Firth*, 19 Ch. D. 419; 51 L. J. Ch. 473; *Richardson* v. *Harris*, 22 Q. B. D. 268; *Darlow* v. *Bland*, [1897] 1 Q. B. 125; 66 L. J. Q. B. 157; 75 L. T. 537; *Parsons* v. *Equitable Investment Co.*, [1916] 2 Ch. 527; 85 L. J. Ch. 761; 115 L. T. 194). It is not untrue to describe the consideration as paid to the grantor if it is paid to someone else at his request (22 Q. B. D., at p. 274), and in this case it is immaterial whether it is paid in respect of an existing or a future debt (*Re Wiltshire*, [1900] 1 Q. B. 96; 69 L. J. Q. B. 145; 81 L. T. 616).

(*z*) S. 10 (1) (1878).

security bill this is not necessary, but the attestation must be by one or more credible witnesses, not being parties to the bill (*a*).

The original bill, with every schedule or inventory annexed or therein referred to, with a true copy (*b*) of the bill, of every schedule or inventory and every attestation, together with an affidavit verifying (i) the time when it was given, (ii) its due execution and attestation, and (iii) the residence and occupation of the grantee and every attesting witness, must be presented to, and the copy and affidavit filed with, the registrar (*c*) within seven clear days after it was given (*d*) (or, in case of a *security* bill, if it is executed out of England, within seven clear days after the date at which it would arrive in England if posted within seven days after its execution (*e*)); if, however, the seven days expire on a Sunday, or other day on which the office is closed, registration is good if made on the next day (*f*). *Any substantial defect or inaccuracy in the affidavit will render the registration void* (*g*).

If the bill of sale is subject to any defeasance or condition or declaration of trust not contained in the body thereof, the same is deemed to be part of the bill, and must be written on the same paper therewith before registration, and must be set forth in the copy that is filed, otherwise the *registration is void* (*h*).

A defeasance is a collateral stipulation defeating some provision of the bill of sale (*i*) as, for instance, a collateral agreement

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(*a*) S. 10 (1882).

(*b*) See *Burchell* v. *Thompson*, [1920] 2 K. B. 80; 89 L. J. K. B. 533; 122 L. T. 758; 36 T. L. R. 257; *Commercial Credit Company of Canada, Ltd.* v. *Fulton*, [1923] A. C. 798; 93 L. J. P. C. 12; 130 L. T. 72; 39 T. L. R. 684.

(*c*) The Masters of the High Court execute the office of registrar (s. 13 (1882)). Where the district in which the grantor resides or the chattels are situated is outside the London Bankruptcy district the registrar must send to the county court registrar of such district or districts a copy of the bill and every schedule and inventory and for that purpose may require more than one copy to be presented on registration (s. 11 (1882); Administration of Justice Act, 1925, s. 23).

(*d*) S. 10 (2) (1878). (*e*) S. 8 (1882). (*f*) S. 22 (1878).

(*g*) Here again the cases are too numerous to be dealt with, especially as regards misdescriptions of residence and occupation. The test is whether the description is sufficient for the purposes of identification (*Ex p. MacHattie*, 10 Ch. D., at p. 407; 48 L. J. Bk. 26; 39 L. T. 373). Thus it is erroneous and misleading to describe a person who carries on the business of soap manufacturer as a gentleman of no occupation (*Re Boddington*, 84 L. J. K. B. 2119); or to describe simply as a married woman a wife living apart from her husband and employed as manageress of a business (*Kemble* v. *Addison*, [1900] 1 Q. B. 430; 69 L. J. Q. B. 299; 82 L. T. 91). (*h*) S. 10 (3) (1878).

(*i*) *Heseltine* v. *Simmons*, [1892] 2 Q. B., at p. 553; 62 L. J. Q. B. 5; 67 L. T. 611.

that, if the borrower obtains money from any other loan office, the whole loan may be called in as if an instalment had been missed (*k*). Examples of conditions are (i) a provision that the lender should have recourse to other securities first (*l*), (ii) a stipulation in a promissory note, given at the same time as the bill of sale and providing for the same monthly payments, that if default should be made in payment of one instalment, the whole sum unpaid should immediately become due (*m*), (iii) a provision in a mortgage, given at the same time as the bill of sale and providing for the same monthly payments, but with compound interest, whereas only simple interest was payable under the bill of sale (*n*). The section, however, applies only to agreements which are part of the bargain, and made before or contemporaneously with the bill of sale and not to those made subsequently (*o*).

A transfer or assignment of a registered bill of sale need not be registered; if two or more bills of sale are given in respect of the same chattels they have priority in order of their date of registration (*p*).

The registration must be renewed every five years by an affidavit stating the date of the bill and the last registration, and the names, residences, and the occupations of the parties, and that it is a subsisting bill (*q*). Upon evidence of the discharge of the debt for which the bill was given, the registrar may order a memorandum of satisfaction to be written upon any registered copy of the bill (*r*).

(*k*) *Smith* v. *Whiteman*, [1909] 2 K. B. 437; 78 L. J. K. B. 1073; 100 L. T. 770; *Hall* v. *Whiteman*, [1912] 1 K. B. 683; 81 L. J. K. B. 660; 105 L. T. 854; 28 T. L. R. 161.

(*l*) *Heseltine* v. *Simmons* (*ubi supra*).

(*m*) *Counsell* v. *London and Westminster, etc., Co.*, 19 Q. B. D. 512; 56 L. J. Q. B. 622; as explained in *Edwards* v. *Marcus* (*infra*). The promissory note is, however, valid (*Monetary Advance Co.* v. *Cater*, 20 Q. B. D. 785; 57 L. J. Q. B. 463; 59 L. T. 311.

(*n*) *Edwards* v. *Marcus*, [1894] 1 Q. B. 587; 63 L. J. Q. B. 363; 70 L. T. 182. It is immaterial whether the defeasance or condition is in favour of the grantor or the grantee (*id.*). The mere fact that a collateral security is given does not however vitiate the bill of sale (*Carpenter* v. *Deen*, 23 Q. B. D. 566; 61 L. T. 860).

(*o*) *Linford* v. *Pockett*, [1895] 2 Ch. 835; 64 L. J. Ch. 752; 73 L. T. 197; *Lester* v. *Hickling*, [1916] 2 K. B. 302; 85 L. J. K. B. 1060; 114 L. T. 798.

(*p*) S. 10 (3) (1878).

(*q*) S. 11 (1878).

(*r*) S. 15 (1878).

Any Judge of the High Court on being satisfied that the omission to register a bill of sale, or an affidavit of renewal, within the prescribed time, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions as to security, notice by advertisement or otherwise, as he thinks fit to direct (*s*).

To prevent evasion of the Act by the execution of fresh bills of sale within seven days, it is provided that any bill of sale executed within seven days after the execution of an unregistered bill for the same debt or part thereof, and in respect of the same chattels or part thereof, shall be absolutely void, unless proved to have been given *bona fide* for the purpose of correcting some material error in the prior bill (*t*).

As regards the result of non-compliance with the rules relating to registration there are the following differences between absolute and security bills:—

1. By s. 20 of the Act of 1878 chattels comprised in an *absolute* bill of sale which is duly registered are not deemed to be in the possession, order, or disposition of the grantor within the meaning of s. 38 of the Bankruptcy Act, 1914 (*u*). But so far as concerns *security* bills, this section is repealed by s. 15 of the Act of 1882 (*x*).

2. By s. 8 of the Act of 1878 an *absolute* bill of sale which is not duly attested or registered, or does not set forth the consideration—

(*s*) S. 14 (1878). This section applies only to rectification of the *register*, and a Judge has no power to allow a supplemental affidavit to be filed in order to supply particulars inadvertently omitted from the affidavit filed at the time of registration (*Crew* v. *Cummings*, 21 Q. B. D. 420; 57 L. J. Q. B. 641; 59 L. T. 886). Moreover, the time for re-registration cannot be extended so as to defeat the rights of an execution creditor (*id.*), or the trustee in bankruptcy of the grantor of the bill of sale (*Re Parsons, ex p. Furber*, [1893] 2 Q. B. 122; 62 L. J. Q. 365; 68 L. T. 777), in whom the title to the goods has vested in consequence of the failure of the holder of the bill to re-register within the time prescribed by the Act.

(*t*) S. 9 (1878).

(*u*) *Ante*, p. 363.

(*x*) See *Swift* v. *Pannell*, 24 Ch. D. 210; 53 L. J. Ch. 341; 48 L. T. 351; *Heseltine* v. *Simmons*, [1892] 2 Q. B. 547; 62 L. J. Q. B. 5; *Re Ginger*, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777; 76 L. T. 808.

(a) is deemed fraudulent and *void against certain persons only*, namely, (i) the grantor's trustee in bankruptcy, (ii) the trustee of any assignment for the benefit of creditors, and (iii) an execution creditor or sheriff's officer seizing the chattels in the execution of any process of any Court;

(b) is, even against them, *void only so far as regards any chattels comprised in it which are in the possession or apparent possession of the grantor.* Goods are in the apparent possession of the grantor so long as they are on premises occupied by him, or are used or enjoyed by him in any place whatsoever, although formal possession may have been taken by someone else (*y*).

As to security bills, the above section is repealed by s. 15 of the Act of 1882; and by s. 8 of the latter Act it is provided that a security bill of sale, not duly attested or registered, or not truly setting forth the consideration, shall be *void in respect of the personal chattels contained therein.* In this case the bill of sale is *void as between the grantor and the grantee*; and the grantee gets no title to the goods, even though he has taken possession (*z*), but the grantor is liable on his covenant for payment (*a*).

Requisites of form.—An *absolute* bill of sale need not be in any particular form. A *security* bill of sale is governed by s. 9 of the Act of 1882, which provides that every bill of sale given by way of security for the payment of money is *void, unless made in accordance with the form prescribed* by the schedule to the Act (*b*).

(*y*) S. 4. Thus mere formal possession by a broker's man is not enough. There must be something done " which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them " (*Ex p. Jay*, 9 Ch. D., at p. 704; 43 L. J. Bk. 122; 31 L. T. 260). Where as between husband and wife the situation of the goods is consistent with their being in the possession of either party, the law attributes possession to the party who has the legal title, so that an assurance by a husband to his wife is not affected by this section merely because the goods remain in the house which they both occupy (*Ramsay* v. *Margrett*, [1894] 2 Q. B. 18; 63 L. J. Q. B. 513; 70 L. T. 288; see also *French* v. *Gething*, [1922] 1 K. B. 236; 91 L. J. K. B. 276; 126 L. T. 394; 38 T. L. R. 77)

(*z*) *Ex p. Parsons*, 16 Q. B. D. 532; 55 L. J. Q. B. 137; 53 L. T. 897.

(*a*) *Heseltine* v. *Simmons*, [1892] 2 Q. B., at pp. 553, 544.

(*b*) Accordingly, most of the instruments specified in s. 4 of the Act of 1878 cannot be good security bills.

By s. 4 every security bill must have annexed thereto a schedule containing an inventory of the personal chattels comprised in the bill, and subject to two exceptions in s. 6 is *void, except as against the grantor, in respect of any chattels not specifically described in the schedule.*

By s. 5 every security bill is *void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill* (*c*).

But, by s. 6, nothing in ss. 4 and 5 shall make a bill of sale void in respect of—

(a) Crops growing at the time of its execution, and separately assigned or charged.

(b) Fixtures separately assigned, and plant or trade machinery, where such fixtures, plant, or machinery are used in, attached to, or brought on any land or premises in substitution for those specifically described in the schedule (*d*).

By s. 12 *every security bill given in consideration of any sum under £30 is void.*

Form of Security Bill Prescribed by the Schedule.

This Indenture made the day of between A B of of the one part, and C D of of the other part, witnesseth that in consideration of the sum of £ now paid to A B by C D, the receipt of which the said A B hereby acknowledges [*or whatever else the consideration may be*],

(*c*) The grantor of a security bill of sale is still, to the extent of his equity of redemption, the true owner of the chattels and may grant a second bill of sale of the same chattels (*Thomas* v. *Searles*, [1891] 2 Q. B. 408; 60 L. J. Q. B. 722; 65 L. T. 39). But to be true owner a person must have a legal or equitable title; a hirer of chattels who merely has an option to purchase is not the true owner (*Lewis* v. *Thomas*, [1919] 1 K. B. 319; 88 L. J. K. B. 275). Where, however, a person has a voidable title to goods he is the true owner until his title has been avoided (*Harrods, Ltd.* v. *Stanton*, [1923] 1 K. B. 516; 92 L. J. K. B. 403; 128 L. T. 685). Where a husband and wife, who were together described as "the grantor," gave a bill of sale over chattels which, in fact, belonged to the wife alone, it was held that "the grantor" was not the true owner of the goods (*Gordon* v. *Goldstein*, [1924] 2 K. B. 779; 94 L. J. K. B. 21; 132 L. T. 155).

(*d*) The word "plant" means plant in reference to some specific locality, not, *e.g.*, horses of a cab proprietor, which are not used in the premises, but in the streets (*London, etc., Discount Co.* v. *Creasy*, [1897] 1 Q. B. 768; 66 L. J. Q. B. 503; 76 L. T. 612).

he the said A B doth hereby assign unto C D, his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A B doth further agree and declare that he will duly pay to the said C D the principal sum aforesaid, together with the interest then due, by equal payments of £ on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A B doth also agree with the said C D that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C D for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, etc.,

Signed and sealed by the said A B in the presence of me E F [*add witness' name, address, and description*].

Any substantial divergence from this form renders the bill of sale wholly void as between grantor and grantee, so that the latter cannot sue on the covenant to pay (*e*). "A divergence is substantial when it departs from the statutory form in anything which is a characteristic of that form" (*f*), even though it does not alter the legal effect (*g*), or if it gives the bill of sale a different legal effect or consequence, either greater or smaller, than that which would attach to it if drawn in the proper form (*h*). The decisions on this point are very numerous, and only a few illustrations can be given.

(*e*) *Davies* v. *Rees*, 17 Q. B. D. 408; 55 L. J. Q. B. 363; 54 L. T. 813. But he can recover the money actually lent (*id.*).

(*f*) *Thomas* v. *Kelly*, 13 A. C., at p. 520; 58 L. J. Q. B. 66; 60 L. T. 114.

(*g*) *Parsons* v. *Brand*, 25 Q. B. D. 110; 59 L. J. Q. B. 189; 62 L. T. 479 (omission of address and description of attesting witness).

(*h*) *Thomas* v. *Kelly*, 13 A. C., at p. 517. The section must be construed as prescribing "nor only what a bill of sale must contain, but also what it must not contain" (*id.*, at p. 511).

The omission of the receipt clause renders the bill invalid (*i*). Where the grantor was expressed to assign " as beneficial owner " it was held that this addition invalidated the bill, as it would, under s. 7 of the Conveyancing Act, 1881, imply covenants for title, which are not provided for by the form (*k*). The assignment must be of goods specifically described and capable of present assignment, so that the bill is avoided if, in addition to chattels " specifically described in the schedule," it purports to assign any future or after-acquired property other than fixtures, plant, or trade machinery coming within s. 6 (2) of the Act (*l*). The assignment must be of personal chattels only (*m*). The name and description of the grantee must be given (*n*). The consideration must be a definite sum of money, so that a bill of sale given as an indemnity to a surety is void (*o*); the interest must also be at a definite *rate*, and not a lump sum (*p*), though the bill is not void because the rate is not calculated " per cent. per annum." The times of payment must be definite, so that a covenant for payment on demand is not within the form (*q*); but a clause may be added that, if default shall be made in any payment when it becomes due, the whole of the principal

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(*i*) *Davies* v. *Jenkins*, [1900] 1 Q. B. 133; 69 L. J. Q. B. 187; 81 L. T. 788; *Burchell* v. *Thompson*, [1920] 2 K. B. 80; 122 L. T. 758; 36 T. L. R. 257.

(*k*) *Ex p. Stanford*, 17 Q. B. D. 259; 55 L. J. Q. B. 341; 54 L. T. 894.

(*l*) *Thomas* v. *Kelly* (*ubi supra*). Such fixtures, etc., must be mentioned in the schedule, as the form does not contain in the body a substantive description of the chattels (13 A. C., at pp. 520, 521).

(*m*) *Cochrane* v. *Entwistle*, 25 Q. B. D. 116; 59 L. J. Q. B. 418; 62 L. T. 852. But if the instrument contains two severable agreements it may be valid in part. Thus an agreement containing a conditional assignment of (i) a piano, and (ii) a hire-purchase agreement of the piano was held valid as regards the latter (*Re Isaacson*, [1895] 1 Q. B. 333; 64 L. J. Q. B. 191; 71 L. T. 812; and see also *Ex p. Byrne*, 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708). But a document assigning a motor car or the proceeds when sold is one entire assignment, since the proceeds of sale are only assigned as representing the car. Accordingly, the equitable assignment of the proceeds cannot be severed from the assignment of the car and is void, unless the document is registered as a bill of sale (*National Provincial, etc., Bank of England* v. *Lindsell*, [1922] 1 K. B. 21; 91 L. J. K. B. 196; 126 L. T. 319).

(*n*) *Altree* v. *Altree*, [1898] 2 Q. B. 267; 67 L. J. Q. B. 882; 78 L. T. 794. As to what description is sufficient, see *Simmons* v. *Woodward*, [1892] A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534.

(*o*) *Hughes* v. *Little*, 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 476.

(*p*) *Myers* v. *Elliott*, 16 Q. B. D. 526; 55 L. J. Q. B. 233; 54 L. T. 552; *Blankenstein* v. *Robertson*, *infra*.

(*q*) *Hetherington* v. *Groome*, 13 Q. B. D. 789; 53 L. J. Q. B. 577. But a covenant to pay " on or before a fixed date " is not bad (*De Braam* v. *Ford*, L. R. 4 Ch. 142; 69 L. J. Ch. 82; 81 L. T. 568).

and interest then due shall at once become payable (*r*). It has also been held that a bill of sale may be void because it is so complicated in its terms as to differ substantially from the form (*s*). If the address and description of the witness are not in the attestation clause, the bill is void (*t*).

No additional covenants may be added, except such as are "for the maintenance or defeasance of the security," as, *e.g.*, covenants to insure (*u*), to pay rents, rates, and taxes and produce receipts (*x*), to replace worn-out chattels (*y*), or, subject to s. 7 of the Act, to allow the grantee to seize and sell the goods.

By s. 7 personal chattels comprised in a bill of sale can be seized or taken possession of only in the following cases:—

i. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale and necessary for maintaining the security (*z*).

(*r*) *Lumley* v. *Simmons*, 34 Ch. D. 698; 56 L. J. Ch. 339; 46 L. T. 134.

(*s*) *Melville* v. *Stringer*, 13 Q. B. D. 392; 53 L. J. Q. B. 482; 50 L. T. 774. Here the bill was made between the grantor and four sets of grantees to secure different debts owing to each respectively at different times. See also *Saunders* v. *White*, [1902] 2 K. B. 472; 71 L. J. K. B. 318; 86 L. T. 173, where a bill of sale was held void because there were two grantors and the goods did not belong to them jointly, but some belonged to one grantor and the rest to the other.

(*t*) *Blankenstein* v. *Robertson*, 24 Q. B. D. 543; 59 L. J. Q. B. 315; 62 L. T. 732.

(*u*) *Watkins* v. *Evans*, 18 Q. B. D. 386; 56 L. J. Q. B. 200; 56 L. T. 177. See *Cartwright* v. *Regan*, [1895] 1 Q. B. 900; 64 L. J. Q. B. 507.

(*x*) Power may be given to the grantee to pay rent, rates, taxes or insurance in default of proper payment by the grantor and to charge the amount so paid, with interest, upon the chattels; and such a charge does not violate the rule that the consideration must be a specific sum of money (*Ex p. Stanford*, 17 Q. B. D. 259; *Goldstrom* v. *Tallerman*, 18 Q. B. D. 1; 56 L. J. Q. B. 22; 55 L. T. 886); but no provision may be made that such amounts may be recoverable by seizure, as such a provision would contravene s. 7 (*infra*); see *Bianchi* v. *Offord*, 17 Q. B. D. 484; 55 L. J. Q. B. 486; *Real and Personal Advance Co.* v. *Clears*, 20 Q. B. D. 304; 57 L. J. Q. B. 164; 58 L. T. 610.

(*y*) *Seed* v. *Bradley*, [1894] 1 Q. B. 319; 63 L. J. Q. B. 387; *Consolidated Credit Corporation* v. *Gosney*, 16 Q. B. D. 24; 55 L. J. Q. B. 61; 54 L. T. 21.

(*z*) *I.e.*, necessary for maintaining the security created by the bill of sale, not merely the maintenance of a sufficient security less than that agreed to be given (*Furber* v. *Cobb*, 56 L. J. Q. B. 273; 18 Q. B. D. 494; 58 L. T. 698). "That security is maintained only where the subject-matter of the charge, and the grantee's title to that subject-matter, are both preserved in as good plight and condition as at the date of the bill of sale" (18 Q. B. D., at p. 509).

ii. If the grantor shall become a bankrupt (*a*), or suffer the said goods or any of them to be distrained for rent, rates, or taxes.

iii. If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises.

iv. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes.

v. If execution shall have been levied against the goods of the grantor under any judgment at law.

And the grantor may, within five days from the seizure or taking of possession for any of these causes, apply by summons to a Judge in Chambers, who, if satisfied that, by payment of money or otherwise, the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or may make such other order as may seem just (*b*).

By s. 13 all personal chattels seized or taken possession of under any bill of sale must not be removed or sold until the expiration of five clear days from the time of seizure (*c*).

By s. 14 a security bill does not protect chattels against distress under a warrant for the recovery of rates and taxes (*d*).

(*a*) The possession by a grantor of a bill of sale of the goods comprised therein is a possession "by consent of the true owner" within s. 38 (c) of the Bankruptcy Act, 1914 (*ante*, p. 363), and, accordingly, if he becomes bankrupt, will pass to his trustee in bankruptcy if they are in his possession in his trade or business under such circumstances that they are in his reputed ownership (*Re Ginger*, [1897] 2 Q. B. 461; 66 L. J. Q. B. 777).

(*b*) Where the grantee takes possession of the goods for the purpose of realising his security by sale of the goods the Judge has jurisdiction to order the security to be given up on payment of the principal, interest to date and costs (*Ex p. Wickens*, [1898] 1 Q. B. 543; 67 L. J. Q. B. 397). But no such order can be made when the grantee takes possession merely for the purpose of maintaining his security (*Ex p. Ellis*, [1898] 2 Q. B. 79; 67 L. J. Q. B. 734; 78 L. T. 733).

(*c*) The power of sale impliedly given by the Act does not incorporate the provisions of s. 20 of the Conveyancing Act, 1881 (now s. 103 of the Law of Property Act, 1925) (*Calvert* v. *Thomas*, 19 Q. B. D. 204; 56 L. J. Q. B. 470). If the grantee, with the consent of the tenant, removes the goods before the five days in order to prevent distraint, this does not give the landlord any rights against him under the Distress for Rent Act, 1837, which applies only where the removal is by the tenant (*Tomlinson* v. *Consolidated, etc., Corporation*, 24 Q. B. D. 135; 62 L. T. 162).

(*d*) But it has been held to protect them from liability to *execution* under a judgment for rates (*Wimbledon Local Board* v. *Underwood*, [1892] 1 Q. B 836; 67 L. T. 55; 61 L. J. Q. B. 484).

The schedule must contain an inventory, in which the personal chattels comprised in the bill of sale must be described with such particularity as is sufficient to identify them, and are usually made for business purposes with regard to the particular subject-matter (*e*). What is sufficient varies according to the circumstances of the case. Thus chattels belonging to a trader, or farm stock, both of which are ordinarily changed from time to time, require a more specific description than furniture in a private house, which is not so frequently changed. Accordingly, descriptions of a trader's stock as "450 oil paintings in gilt frames" (*f*), and of farm stock as "21 milch cows," have been held insufficient (*g*); but a description of books in a private house as follows, "Study, 1,800 volumes of books as per catalogue," was held sufficient as being an assignment of all the books in the study, further described as being 1,800 in number and mentioned in a catalogue (*h*).

If there is no schedule, the bill is void as not being in proper form (*i*).

(*e*) *Witt* v. *Banner*, 20 Q. B. D., at p. 118; 57 L. J. Q. B. 141; 58 L. T. 34.

(*f*) *Witt* v. *Banner* (*ubi supra*).

(*g*) *Carpenter* v. *Deen*, 23 Q. B. D. 566; 61 L. T. 860. But a description of stock as "Cows, 19 short-horns and 1 Jersey cow," has been held sufficient (*Herbert's Trustee* v. *Higgins*, [1926] 1 Ch. 794; 95 L. J. Ch. 303; 135 L. T. 321; 42 T. L. R. 525).

(*h*) *Davidson* v. *Carlton Bank*, [1893] 1 Q. B. 82; 62 L. J. Q. B. 111; 67 L. T. 641.

(*i*) *Griffin* v. *Union Deposit Bank*, 3 T. L. R. 608.

CHAPTER V.

NEGOTIABLE INSTRUMENTS.

If A owes B the sum of £100, the right of B to enforce payment is, as we have seen, a *chose in action* which formerly was *assignable* only in Equity, but of which a legal assignment is now possible, though in all cases the assignee takes *subject to equities*. If, however, A, owing B the sum of £100, makes a written promise to pay, that written promise may in some cases amount to a *negotiable instrument* which an assignee can take *free from equities*, and on which he can sue in his own name (*a*).

A negotiable instrument is, therefore, a written promise to pay money (*b*) of such a kind and in such a condition that it can be assigned by mere delivery, and may be enforced by any assignee who is a holder in due course, notwithstanding any defect in, and free from any equity attaching to, the title of any previous holder. It must be noticed that in order to give this right to an assignee, three conditions must be fulfilled:—

1. The instrument must be one to which this character of negotiability is attached by English law.
2. It must be in such a condition that the mere delivery operates as a complete transfer both of the document and the obligation.
3. The assignee must be a holder in due course.

1. *What instruments are negotiable.*—Negotiable instruments are of two classes: (a) those which are negotiable by statute, and (b) those which are negotiable by usage:—

(*a*) See *Crouch* v. *Crédit Foncier of England*, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183; 29 L. T. 259.

(*b*) Or to deliver a security representing money, as in the case of the scrip of a foreign Government, containing a promise, after all instalments are paid, to give a bond for the amount (*Goodwin* v. *Robarts*, 1 A. C. 476; 46 L. J. Ex. 748; 35 L. T. 179).

(a) The following are negotiable instruments by statute:—Bills of exchange, cheques and promissory notes, by the Bills of Exchange Act, 1882 (*c*). Bills of exchange and cheques were, however, negotiable by the law merchant before their negotiability was declared by statute (*d*), and promissory notes were previously made negotiable by the Promissory Notes Act, 1704 (*e*). East India Company bonds, by the East India Company Bonds Act, 1811 (*f*). Dividend warrants issued under the National Debt (Conversion) Act, 1888 (*g*).

(b) The following have been held to be negotiable instruments by usage:—Exchequer bills (*h*), bank notes (*i*), share warrants (*k*), circular notes (*l*), scrip to bearer (*m*), and bearer debentures (*n*). Some foreign bearer bonds have also been held to be negotiable instruments. With regard to these, however, it must be noticed that they can become negotiable only by English commercial usage (*o*), though, as in the case of English instruments, modern usage is sufficient (*p*). Bills of lading (*q*), post office orders (*r*),

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(*c*) 45 & 46 Vict. c. 61. But a bill of exchange is not negotiable if it contains words prohibiting transfer (s. 8 (1)), and in the case of a cheque the character of negotiability is lost if it is crossed "not negotiable" (s. 81).

(*d*) For their origin and history, see the judgment of Cockburn, L.C.J., in *Goodwin* v. *Robarts*, L. R. 10 Ex., at pp. 346, 358. They were in use in Italy from the 12th century, and from there found their way into France and then to England. Their first mention in an English report is in the beginning of the 17th century, though they were in common use at a much earlier period. Their use was at first confined to foreign bills between English and foreign merchants; it was then extended to domestic bills between traders, and finally to bills of all persons, whether traders or not.

(*e*) 3 & 4 Anne, c. 8.

(*f*) 51 Geo. 3, c. 64; see *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B., at p. 383.

(*g*) 51 Vict. c. 2, s. 30 (5), by which they are to be deemed cheques.

(*h*) *Wookey* v. *Pole*, 4 B. & Ald. 1; 22 R. R. 594.

(*i*) *Miller* v. *Race*, 1 Burr. 452.

(*k*) *Webb, Hale & Co.* v. *Alexandra Water Co.*, 93 L. T. 339; 21 T. L. R. 572.

(*l*) *Conflans Quarry Co.* v. *Parker*, L. R. 3 C. P. 1; 37 L. J. C. P. 51; 17 L. T. 283.

(*m*) *Rumball* v. *Metropolitan Bank*, 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240; *Goodwin* v. *Robarts* (*ubi supra*).

(*n*) *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; 67 L. J. Q. B. 987; 79 L. T. 270; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204.

(*o*) *Picker* v. *London and County Bank*, 18 Q. B. D., at p. 518; 56 L. J. Q. B. 299; *Williams* v. *Colonial Bank*, 38 Ch. D., at p. 404; 57 L. J. Ch. 826. See also *Colonial Bank* v. *Cady*, 15 A. C. 267; 60 L. J. Ch. 131.

(*p*) See cases in note (*n*), *supra*.

(*q*) *Ante*, p. 327.

(*r*) *Fine Art Society* v. *Union Bank of London*, 17 Q. B. D. 705; 56 L. J. Q. B. 70.

and share certificates (*s*) are not negotiable instruments, nor is an IOU, which is merely evidence of an account stated (*t*); nor is a document which is a mere receipt (*u*).

2. *When they are negotiable.*—Even if an instrument is of a kind which is negotiable it must be in such a condition as to be transferable by delivery. It must, therefore, either be payable to bearer, or, if payable to order, it must be indorsed by the holder before he transfers it (*v*). In the latter case, moreover, the indorsement must not be restrictive (*x*).

3. *Holder in due course.*—In order that an assignee may be a holder in due course—

(i) He must have taken the negotiable instrument in a perfect shape and in terms a complete contract (*y*). The instrument must be "complete and regular on the face of it" (*z*).

(ii) He must have taken it "for value" (*a*).

(iii) He must have taken it in good faith and without "notice of any defect in the title of the person who negotiated it" (*b*). By s. 90 of the Bills of Exchange Act, 1882, which is declaratory of the Common Law, "a thing is deemed to be done in good faith within the meaning of this Act where it is in fact done honestly, whether it is done negligently or not." But negligence, when considered in connection with the surrounding circumstances, may be evidence of bad faith (*c*). Notice includes not only actual knowledge of the facts but a suspicion that there is something wrong, whether or not it is a suspicion of what the

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(*s*) *Colonial Bank* v. *Cady*, 15 A. C. 267; 60 L. J. Ch. 311; 63 L. T. 27.

(*t*) *Fesenmayer* v. *Adcock*, 16 M. & W., at p. 450; 73 R. R. 567.

(*u*) *Jones & Co.* v. *Coventry*, [1909] 2 K. B. 1029; 79 L. J. K. B. 41; 101 L. T. 281; 25 T. L. R. 736.

(*v*) *Whistler* v. *Forster*, 32 L. J. C. P. 161; 14 C. B. (N.S.) 248; 8 L. T. 317; *Good* v. *Walker*, 61 L. J. Q. B. 736; Bills of Exchange Act, 1882, s. 31. As to forged indorsements, see *post*, p. 412.

(*x*) Bills of Exchange Act, 1882, s. 35; see further *post*, p. 35.

(*y*) *Hatch* v. *Searles*, 24 L. J. Ch. 22.

(*z*) Bills of Exchange Act, 1882, s. 29, *post*, p. 416.

(*a*) *Ibid.*

(*b*) *Ibid.*

(*c*) *Re Gomersall*, 1 Ch. D., at p. 146; 47 L. J. Bk. 1. One of the surrounding circumstances which is of great importance is the adequacy of the amount paid for the negotiable instrument.

particular wrong is, coupled with a refusal to make enquiry lest that suspicion should be confirmed (*d*). And suspicion may be inferred from "the knowledge of circumstances calculated to arouse suspicion" (*e*), though mere carelessness or foolishness in not suspecting is not sufficient to prevent a man from being a holder in due course (*f*).

Bills of Exchange.

The law on the subject of bills of exchange, cheques, and promissory notes was codified by the *Bills of Exchange Act*, 1882 (*g*).

Form and Interpretation (*h*).—*Definitions.*—By *s.* 3 (1), *a bill of exchange* is defined as "*an* (1) *unconditional* (2) *order* (3) *in writing* (4) *addressed by one party to another* (5) *signed by the person giving it* (6) *requiring* (7) *the person to whom it is*

(*d*) *Jones* v. *Gordon*, 2 A. C., at p. 629; 47 L. J. Bk. 1; 377 L. T. 477.

(*e*) *London Joint Stock Bank* v. *Simmons*, [1892] A. C., at p. 227; 61 L. J. Ch. 723; 66 L. T. 625.

(*f*) *Jones* v. *Gordon* (*ubi supra*); *Raphael* v. *Bank of England*. Two very important cases to notice are those of *Sheffield* v. *London Joint Stock Bank*, 13 A. C. 333; 57 L. J. Ch. 986; 58 L. T. 735, explained and distinguished in the case of *London Joint Stock Bank* v. *Simmons* (*supra*). In the first case a money-lender, having advanced money to his own clients upon the security of negotiable instruments, deposited them with a bank as security for a greater amount than he himself had advanced upon them. The bank knew the nature of his business and that he was in the habit of lending money upon such securities. *Held* that, as it had knowledge of facts calculated to arouse suspicion, it was put upon enquiry as to the "money-lender's authority to deal with the securities"; it could therefore have no greater right over them than the money-lender himself, and must give them up on payment of the amount for which they were pledged to the money-lender by his clients. In the second case a broker fraudulently deposited with a bank, as security for an advance to himself, negotiable instruments belonging to his clients. The securities were taken by the bank in the ordinary course of their business with the broker, and the bank did not know whether they belonged to the broker or to his clients or whether he had any authority to dispose of them, and it made no enquiries. *Held* that, as there were in fact no circumstances calculated to arouse suspicion that the broker had no right to deal with the securities, the bank was not put upon enquiry and was therefore a holder in due course.

(*g*) 45 & 46 Vict. c. 61. Unless otherwise stated the references in this chapter are to the Act. The cross references in the text should be noted.

(*h*) The Act is divided into parts, with sub-divisions dealing with different subject-matters, *e.g.*, Form and Interpretation, Capacity and Authority of Parties, Consideration, etc., and particular sections must be construed according to the subject-matter to which they apply. See *Morison* v. *London County and Westminster Bank*, [1914] 3 K. B. 56; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481.

addressed (8) *to pay* (9) *on demand or at a fixed or determinable future time* (10) *a sum certain in money* (11) *to or to the order of a specified person or to bearer.*"

A cheque is a bill of exchange drawn on a banker payable on demand and, except as otherwise provided, the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque (*i*).

By *s.* 4, " an *inland* bill is a bill which is, or on the face of it purports to be (a) both drawn and payable within the British Islands; or (b) drawn within the British Islands upon some person resident therein (*k*). Any other bill is a foreign bill. Unless the contrary appear on the face of the bill, the holder may treat it as an inland bill " (*l*).

Forms of a Bill of Exchange.

1.

£500. London, 1st January, 1921.

STAMP.

Three months after sight pay to my order the sum of Five hundred pounds, for value received.

To Henry Jones, William Brown.
1234 Sixth Avenue, Liverpool.

2.

£500. London, 1st January, 1921.

STAMP.

Three months after date pay to John Smith or order the sum of Five hundred pounds, for value received (*m*).

To Henry Jones, William Brown.
1234 Sixth Avenue, Liverpool.

(*i*) S. 73, see *post*, p. 432.

(*k*) " British Islands," for the purposes of the Act, include the United Kingdom, the Islands of Man, Guernsey, Jersey, Alderney and Sark, and the islands adjacent to them, being part of His Majesty's Dominions (s. 4). A foreign bill, if dishonoured, must be protested, but this is not necessary in case of an inland bill (s. 51, *post*, p. 425), except as a preliminary to resort to a referee in case of need (ss. 15, 65 and 67, *post*, pp. 408, 430, 431).

(*l*) S. 4 (2). If no place of payment is specified the bill is payable at the address of the drawee (s. 45 (4) *post*, p. 421).

(*m*) These words, though usual, are not required by the statutory definition; see s. 3 (4), *post*, p. 402.

3.

£500. London, 1st January, 1921.

On demand [*or* at sight] pay bearer the sum of Five hundred pounds, for value received.

To Henry Jones, William Brown.
1234 Sixth Avenue, Liverpool.

The advantage derived from the use of bills of exchange may be illustrated by the following example: Jones wishes to buy goods from Brown to the value of £500, but desires three months' credit. Brown accordingly draws a bill, directed to Jones, and requiring Jones to pay £500 to his (Brown's) order three months after date (*n*). Here Brown is the drawer and also the payee, and Jones is the drawee. Jones accepts the bill, which is then handed back to Brown (*o*). The advantage to Brown is that he can then transfer the bill to anyone to whom he, in his turn, may owe money, who will at the proper time get payment from the acceptor. If the bill is payable to him or bearer, the transfer is effected by simply handing it over; if to him simply, or to him or order, it is effected by his indorsing his name on the back and handing it over, when he, in addition to being the drawer, becomes an indorser; the person to whom he transfers it may in turn transfer it to someone else, and so it may be passed on to any extent. When the time mentioned in the bill for payment arrives, and the bill therefore becomes due, the holder of it presents it to the acceptor for payment. A bill need not necessarily, however, be made payable to the drawer. Thus, if Jones, being in India owes money to Brown in England, who in his turn owes money to Smith in India, Brown can draw a bill on Jones payable to Smith (*p*) and send it to India to Smith, who presents it for acceptance to Jones, and, if Jones accepts it, Smith, or any holder of the bill when it is due, can present it for payment to Jones, and on payment by Jones, the debt of Brown to Smith is discharged.

The acceptor is the person who is primarily liable on the bill, but the drawer and indorsers are also secondarily liable, the

(*n*) See Form 1.
(*o*) See s. 17, *post*, p. 408.
(*p*) See Form 2.

acceptor being the principal debtor and the drawer and indorsers being in a position analogous to that of sureties (*q*).

It must be noted that since a bill of exchange is a written document no evidence can be given of any contemporaneous oral agreement varying its terms (*r*). A bill of exchange or promissory note must be properly stamped, otherwise it is not even admissible as evidence of the receipt of the money for which it was given (*s*).

Form.—An instrument which does not comply with the conditions of form required by s. 3 (1), or which requires any act to be done in addition to the payment of money, is not a bill of exchange (*t*). But "a bill is not invalid by reason (a) that it is not dated; (b) that it does not specify the value given, or that any value has been given; (c) that it does not specify the place where it is drawn or the place where it is payable" (*u*).

The following requirements demand particular attention.

Unconditional order.—A bill must be *unconditional* as between the drawer and drawee. Thus an order to "pay to A, provided that the receipt form at the foot is duly signed, stamped, and dated" is an order imposing upon the drawee a condition as to payment which prevents the instrument from being a bill of exchange (*x*). "An order to pay out of a particular fund is not

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(*q*) See *Duncan Fox & Co.* v. *N. & S. Wales Bank*, 6 A. C. 1; 50 L. J. Ch. 355; 43 L. T. 706.

(*r*) *New London Credit Syndicate* v. *Neal*, [1898] 2 Q. B. 487; 67 L. J. Q. B. 825; 79 L. T. 323. But the circumstances under which it was given may be explained, see *Macdonald* v. *Whitfield*, 8 A. C. 733; 52 L. J. P. C. 70 (*post*, p. 427); *McDonald & Co.* v. *Nash*, [1924] A. C. 625; 93 L. J. K. B. 610; 40 T. L. R. 530; *Elliott* v. *Bax-Ironside*, [1925] 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631. As to the rule which renders oral evidence inadmissible to vary a written document, see *post*, Part IV.

(*s*) *Ashling* v. *Boon*, [1891] 1 Ch. 601; 60 L. J. Ch. 306; 64 L. T. 193. Inland notes of all kinds and inland bills payable otherwise than on demand must be drawn on impressed stamps. See Chalmers' Appendix II., and s. 36 of the Finance Act, 1918.

(*t*) S. 3 (2). But it may operate as an equitable assignment (*ante*, p. 168).

(*u*) S. 3 (4). As to filling in the date, see ss. 12 and 20, *post*, pp. 407, 411. As to place of payment, see *ante*, p. 400, note (*l*).

(*x*) *Bavins* v. *London and South Western Bank*, [1900] 1 Q. B. 270; 69 L. J. Q. B. 164; 81 L. T. 655. This rule applies also to cheques, see *Underwood, Ltd.* v. *Bank of Liverpool*, [1924] 1 K. B., at p. 792; 93 L. J. K. B. 690; 131 L. T. 271; 40 T. L. R. 302. But a notice added at the foot of the bill, directed to the *payee*, and requiring him to sign a receipt at the back, does not make the bill conditional as between drawer and drawee (*Nathan* v. *Ogden*, 93 L. T. 553; 21 T. L. R. 775). Nor does a direction to the payee to retain the bill until another is sent, this also merely making it conditional

unconditional within the meaning of this section; but an unqualified order to pay coupled with (a) an indication of a particular fund out of which the drawee is to re-imburse himself, or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional " (*y*).

Addressed by one person to another.—" Where in a bill drawer and drawee are the same person (*z*) or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note " (*a*).

" The drawee must be named or otherwise indicated in a bill with reasonable certainty."—" A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the *alternative* or to two or more drawees in *succession* is not a bill of exchange " (*b*).

Signed by the person giving it.—It is not, however, necessary for this, or any other signature required by the Act, that a person should sign with his own hand, but it is sufficient if his signature is written by some other person by his authority (*c*). In the case of a corporation it is sufficient if the bill is sealed with the corporate seal, but it is not *necessary* that it should be under seal (*d*).

Payable *to or to the order of a specified person or to bearer.*—" A negotiable bill may be payable either to order or to bearer " (*e*). Where it is not payable to bearer it may be payable either " to " or " to the order of " (i) the drawer, (ii) a third person, or (iii) in some cases the drawee himself (*f*).

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as between drawer and payee (*Roberts* v. *Marsh*, [1915] 1 K. B. 82; 84 L. J. K. B. 338; 111 L. T. 1060; 30 T. L. R. 609).

(*y*) S. 3 (3).

(*z*) As, *e.g.*, where a firm has two houses, one of which draws on the other.

(*a*) S. 5 (2).

(*b*) S. 6 (1) (2). Two or more acceptors of a bill can only be liable jointly. But the name of a drawee " in case of need " may be inserted in the bill, *post*, p. 407.

(*c*) S. 91 (1). The signature may be added at any time, see ss. 18 and 20, *post*, pp. 409, 411.

(*d*) S. 91 (2).

(*e*) S. 8 (2). By s. 2 the term " holder " means the payee or indorsee of a bill or note who is in possession of it, or the bearer; the term " bearer "' means the person in possession of a bill or note payable to bearer.

(*f*) S. 5 (1). A bill may sometimes be drawn payable to the drawee, *e.g.*,

"A bill is payable to *bearer* which is expressed to be so payable, or on which the only or the last indorsement is an indorsement in blank" (*g*).

"A bill is payable to *order* which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable.—Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option" (*h*).

"When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties, but is not negotiable" (*i*).

"Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty.—A bill may be payable to two or more payees jointly or it may be payable in the alternative to one of two, or one or some of several payees. A bill may also be payable to the holder of an office for the time being. Where the payee is a fictitious *or* non-existing person the bill may be treated as payable to bearer" (*k*).

The case of *Bank of England* v. *Vagliano* (*l*) illustrates the meaning of "fictitious person." Vagliano had a large banking account with the Bank of England. One of Vagliano's clerks from time to time drew out bills, to which he forged the name of a well-known customer, put them amongst Vagliano's ordinary bills, and thus got his acceptances to a number of such forged

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"Pay to your own order." This, however, is possible only where the drawee acts in two capacities. See Chalmers' Bills of Exchange, note to s. 5 (1).

(*g*) S. 8 (3). As to indorsement in blank, see s. 34, *post*, p. 417.

(*h*) S. 8 (4) (5). The result of these two sub-sections is that a bill has the same effect whether it is drawn (i) "pay to John Smith or order," or (ii) "pay to John Smith" (provided that it does not contain words prohibiting transfer, etc.), or (iii) "pay to the order of John Smith." A bill drawn payable to "—— order" is equivalent to a bill payable to "my order," and is valid when indorsed by the drawer (*Chamberlain* v. *Young*, [1893] 2 Q. B. 206; 63 L. J. Q. B. 28; 69 L. T. 332).

(*i*) S. 8 (1). In the Act the words "negotiate" and "negotiation" denote transfer by delivery, or indorsement and delivery, whether or not the transfer is free from equities (see s. 31, *post*, p. 417). In order to prevent the bill from being negotiable the words prohibiting transfer must be in the bill as drawn, not in the acceptance: see *Meyer* v. *Decroix*, [1891] A. C. 520, and *National Bank* v. *Silke*, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199.

(*k*) S. 7 (1) (2) (3).

(*l*) [1891] A. C. 107; 60 L. J. Q. B. 145; 64 L. T. 353.

bills, amounting in all to about £70,000. To further deceive his master, the clerk had taken care to draw these bills in favour of a person the customer was in the habit of drawing in favour of. The clerk forged the payee's indorsement, and also took care that the bank was from time to time advised of these bills, and they were duly paid, and debited in Vagliano's pass-book. The fraud was ultimately discovered, and Vagliano sought to recover from the bank the total amount of these fraudulent bills, with which his account had been debited, but in this he failed. The House of Lords held that the payee is a fictitious person within the meaning of this section if the person who draws the bill does not in fact intend that the person named as payee shall receive the money; and in such a case it makes no difference that the name inserted as that of the payee is the name of a real existing person (*m*).

Again, if a person is induced to draw a cheque payable to the order of a person whom he believes to be real and to be his creditor, but who does not in fact exist, the cheque will be treated by virtue of the above-cited section as payable to bearer (*n*). But if a tradesman is induced to draw cheques to the order of actual customers, in payment of sums which his clerk falsely tells him are owing to those customers, these cheques will not be treated as payable to bearer; so that, where the clerk who had made such representation then stole the cheques which had accordingly been drawn and forged the indorsements and got an innocent tradesman to cash them, the drawer of the cheques was held entitled to recover their value from the tradesman (*o*).

Sum certain in money.—" The sum payable by a bill is a sum certain within the meaning of this Act, although it is required to be paid—

" (a) With interest.

" (b) By stated instalments.

" (c) By stated instalments, with a provision that upon

(*m*) It was also held that Vagliano was liable because his conduct had induced the bank to pay the bills.

(*n*) *Clutton* v. *Attenborough*, [1897] A. C. 90; 66 L. J. Q. B. 221; 75 L. T. 556.

(*o*) *Vinden* v. *Hughes*, [1905] 1 K. B. 735; 74 L. J. K. B. 410; 21 T. L. R. 324; *North and South Wales Bank* v. *Macbeth*, [1908] A. C. 137; 77 L. J. K. B. 464; 98 L. T. 470; 24 T. L. R. 397.

default in payment of any instalment the whole shall become due.

" (d) According to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill " (*p*).

" *Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable* " (*q*).

" Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill; and if the bill is undated, from the issue thereof " (*r*).

On demand, or a fixed or determinable future time.—" A bill is payable on demand—

" (a) which is expressed to be payable on demand, or at sight, or on presentation; *or*

" (b) in which no time for payment is expressed."

" Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand " (*s*).

" A bill is payable at a determinable future time within the meaning of this Act which is expressed to be payable—

" 1. At a fixed period after date or sight.

" 2. On, or at a fixed period after, the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain " (*t*).

" An instrument expressed to be payable on a contingency is not a bill, and the happening of the contingency does not cure the defect " (*u*).

Rules as to the date.—" Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance and the bill shall be payable accordingly. Provided that: 1. Where

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(*p*) S. 9 (1).
(*q*) S. 9 (2).
(*r*) S. 9 (3). The word " issue " means " the first delivery of a bill or note, complete in form to a person who takes it as a holder " (s. 2).
(*s*) S. 10 (1) (2).
(*t*) *Nihil morte certius, nihil hora mortis incertius.*
(*u*) S. 11.

the holder in good faith and by mistake inserts a wrong date, and 2. In every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date " (*x*).

" Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be."—" A bill is not invalid by reason only that it is ante-dated or post-dated or that it bears date on a Sunday " (*y*).

Computation of time.—" Where a bill is *not payable on demand*, the day on which it falls due is determined as follows:—

"1. Three days, called *days of grace*, are in every case where the bill does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace " (*z*).

" 2. Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment " (*a*).

" 3. Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance or for non-delivery " (*b*).

4. The term " month " in a bill means " calendar month " (*c*).

Case of need.—" The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may

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(*x*) S. 12.

(*y*) S. 13 (1) (2).

(*z*) S. 14 (1). But (a) " When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day " (*Ibid.*).

(*a*) S. 14 (2), *e.g.*, a bill dated January 1 and payable three months after date is not due and payable until April 4.

(*b*) S. 14 (3).

(*c*) S. 14 (4).

resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit" (*d*). Thus if, as in the illustration previously given, a bill is sent to India, the drawer may provide against the possibility of a refusal by the drawee to accept or pay the bill by inserting therein the name of some agent of his own to whom, upon such refusal, the payee may apply for payment. The referee in case of need is not a party to the bill.

Special stipulations by a drawer or indorser.—"The *drawer* of a bill, and any *indorser*, may insert therein an express stipulation—

"1. Negativing or limiting his own liability to the holder.

"2. Waiving as regards himself some or all of the holder's duties" (*e*).

Acceptance.—"The acceptance of a bill is the signification by the *drawee* of his assent to the order of the drawer" (*f*).

Except in the case of an acceptance for honour, no one but the drawee can be liable as acceptor (*g*), for the bill is, in point of form, invalid unless the acceptance is by the drawee. Thus, if a bill is addressed to a firm in its firm name, the firm can be liable only if the acceptance is in the firm name, or in the names of all the partners (*h*), though, as we have seen, it may be written by the hand of one partner as agent for the firm, if he has authority

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(*d*) S. 15. A bill must be protested or noted for protest before it can be presented to the referee in case of need. See s. 67, *post*, p. 431.

(*e*) S. 16. Thus an indorser may add to his indorsement the words "*sans recours*" or without recourse to me. He thus transfers his interest in the bill without incurring any liability as an indorser in the event of its dishonour. This is called a qualified indorsement. An indorsement waiving the holder's duties is called a facultative indorsement.

(*f*) S. 17 (1). Acceptance in the Act means "acceptance completed by delivery or notification," s. 2; and see s. 21.

(*g*) *Polhill* v. *Walter*, 3 B. & Ad., at p. 122; 1 L. J. K. B. 92; 37 R. R. 344.

(*h*) The firm name is equivalent to the names of all the partners and therefore a bill addressed to partners in the firm name is the same, even in point of form, as if it were addressed to all the partners by name. Accordingly an acceptance by one partner only is a qualified acceptance (s. 19 (2) (e), *post*, p. 410), which will bind him personally. See *Owen* v. *Van Uster*, 10 C. B. 318; 20 L. J. C. P. 61; 84 R. R. 582. If a bill drawn on a firm is properly accepted in the firm name, the additional signature by one of the partners of his own name will not make him personally liable (*Re Barnard*, 32 Ch. D. 447; 55 L. J. Ch. 935; 55 L. T. 40).

to do so. And generally, whenever a bill is drawn upon a principal, it can be accepted only by the principal, though the acceptance may be written by the agent; and, conversely, a bill drawn upon an agent can be accepted only by the agent, who is then personally liable upon the bill, even though he adds words indicating that he is signing for or on behalf of his principal (*i*).

An acceptance " (a) must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. (b) It must not express that the drawee will perform his promise by any other means than the payment of money " (*k*). It is written across the face of the bill and should be dated where the bill is payable *after sight*.

" A bill may be accepted (i) before it has been signed by the drawer, or while it is otherwise incomplete; (ii) when it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment. When a bill payable *after sight* is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance " (*l*).

" *An acceptance is either* (a) *general or* (b) *qualified* " (*m*).

" A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. *In particular* an acceptance is qualified which is—

> " (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated (*e.g.*, accepted—payable on giving up bills of lading);
>
> " (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn;
>
> " (c) local, that is to say, an acceptance to pay only at a particular specified place. An acceptance to pay at a particular place is a general acceptance, unless it

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(*i*) *Mare* v. *Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119; 103 R. R. 831; *Herald* v. *Connah*, 34 L. T. 885.

(*k*) S. 17 (2).

(*l*) S. 18.

(*m*) S. 19 (1). The holder may refuse to take a qualified acceptance, see s. 44, *post*, p. 421.

expressly states that the bill is to be paid there only, and not elsewhere;

" (d) qualified as to time (*e.g.*, a bill drawn payable two months after date is accepted payable six months after date);

" (e) the acceptance of some one or more of the drawees, but not of all " (*n*).

Delivery.—" Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto. Provided that where an acceptance is written on a bill and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable " (*o*). The word " delivery " means " transfer of possession, actual or constructive, from one person to another " (*p*).

" As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

" (a) In order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be;

" (b) May be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill.

" But if the bill be in the hands of a holder in due course a *valid* delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed " (*q*).

" Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved " (*r*).

Inchoate instruments.—" Where a simple signature on a blank stamped paper is delivered by the signer *in order that it may be converted into a bill*, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor,

(*n*) S. 19 (2).
(*o*) S. 21 (1).
(*p*) S. 2.
(*q*) S. 21 (2).
(*r*) S. 21 (3).

or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit."—"In order that any *such* instrument when completed may be enforceable against any person who became a party thereto *prior to its completion*, it must be filled up within a reasonable time and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact."—"Provided that if any *such* instrument after completion is negotiated to a *holder in due course*, it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given" (*s*).

As to this section two points must be noted. Firstly, the blank stamped paper must be *delivered* by the signer, so that, if a man signed a blank cheque which was stolen and subsequently filled up, he would not be liable upon it (*t*). Secondly, it must be delivered *in order that it may be converted into a bill*, so that the section does not apply where the blank stamped paper is handed to an agent, not with the intention that it shall be negotiated, but with directions that it is to be kept to await further instructions (*u*). It must also be noted that this section, though "based on the doctrine of Common Law estoppel" (*x*), does not in any way narrow that doctrine (*y*), and therefore, quite independently of the Act, a person who signs a negotiable instrument in blank or with blank spaces and hands it to another person to be filled up and negotiated is, as against a *bona fide* holder for value without notice, liable for the amount for which it may be filled up, although it has been fraudulently filled up contrary to his express directions (*z*).

(*s*) S. 20 (1) (2). For a full explanation of this section, see *McDonald & Co.* v. *Nash*, [1924] A. C. 625; 93 L. J. K. B. 610; 40 T. L. R. 530. As to authority to fill in the date, see s. 12, *ante*, pp. 406, 407.

(*t*) *Baxendale* v. *Bennett*, 3 Q. B. D. 525; 47 L. J. Q. B. 624.

(*u*) *Smith* v. *Prosser*, [1907] 2 K. B. 735; 97 L. T. 155; 23 T. L. R. 597; 77 L. J. K. B. 71.

(*x*) [1907] 2 K. B., at p. 753.

(*y*) *Lloyds Bank, Ltd.* v. *Cooke*, [1907] 1 K. B. 794; 76 L. J. K. B. 666; 96 L. T. 715; 23 T. L. R. 429.

(*z*) *Id.* In this case A signed his name on a blank stamped paper which he entrusted to B with authority to fill it up as a promissory note for £250, pay-

Capacity and Authority of Parties.

Capacity.—"Capacity to *incur liability* as a party to a bill is co-extensive with capacity to contract."—"Where a bill is drawn or indorsed by an infant . . . or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill and to enforce it against any other party thereto" (*a*).

An infant cannot be sued upon a bill, even though given for necessaries (*b*). A corporation cannot be sued upon a bill unless it has express or implied power to draw, indorse, or accept bills (*c*).

"No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

"(1) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name.

"(2) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm" (*d*).

Forged, etc., signatures.—"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorised signature is *wholly inoperative*, and *no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any other party thereto can be acquired through or under that signature*, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

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able to C, and to deliver it to C as security for an advance to be made by C. B fraudulently filled up the note for £1,000, C having no notice of the fraud. In the case of *Herdman* v. *Wheeler*, [1902] 1 K. B. 361; 71 L. J. K. B. 278; 86 L. T. 48; 18 T. L. R. 190, it had been held that the payee of a promissory note was not within s. 20, because there was no "negotiation" to him. In this case it was held that, quite apart from the Act, A was estopped from disputing the validity of the note: the earlier decision was also doubted (see the judgment of Fletcher Moulton, L.J.).

(*a*) S. 22 (1) (2).

(*b*) *Re Soltykoff*, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339; 8 M. B. R. 27; *ante*, p. 138.

(*c*) *Ante* pp. 154, 155.

(*d*) S. 23.

Provided that nothing in this section shall affect the ratification of an unauthorised signature not amounting to a forgery" (*e*).

A banker who pays a *cheque* on a forged indorsement is specially protected by the Act (*f*).

Procuration signature.—" A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent so signing was acting within the actual limits of his authority" (*g*).

Signatures by agents, etc.—" Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he *signs* for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words *describing* him as an agent, or as filling a representative character, does not exempt him from personal liability."—" In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted" (*h*).

If a party to a bill or note merely *describes* himself as director, or by any similar form of description, but does not state on the face of the instrument that he is *signing* for, or on account of, some company or body of which he is the director or representative, then he is personally liable (*i*). But if an agent indicates plainly that he is signing for or on behalf of a principal he is not

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(*e*) S. 24. The provisions referred to in the first line of this section are contained in ss. 54 and 55, *post*, p. 426, which deal with estoppels and ss. 60, 80 and 82, which protect a banker who pays a cheque held under a forged indorsement. An estoppel might arise if the person whose signature was forged made any assertion that it was genuine, on the faith of which someone else was induced to act (see *Robarts* v. *Tucker*, 16 Q. B., at p. 577; 20 L. J. Q. B. 270). A cheque signed by an agent having authority to sign is not a forgery merely because it is signed in fraud of his authority, and his signature may therefore be ratified (*Morison* v. *London County and Westminster Bank*, [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481).

(*f*) S. 60, *post*, p. 436.

(*g*) S. 25. Where an employee, in payment of his betting debts, gives cheques signed *per pro.* his employer, the payee has notice that the cheques are drawn for purposes outside the business of the employer, who is not therefore liable in the absence of evidence that the employee had actual authority to draw such cheques (*Morison* v. *Kemp*, 29 T. L. R. 70).

(*h*) S. 26 (1) (2).

(*i*) *Dutton* v. *Marsh*, L. R. 6 Q. B., at p. 364; 40 L. J. Q. B. 175; 24 L. T. 170; *Elliott* v. *Bax-Ironside* (*infra*, p. 414, note (*n*).

as a general rule personally liable (*k*), except (i) where he accepts a bill drawn on him personally (*l*); (ii) in cases within s. 63 of the Companies (Consolidation) Act, 1908 (*m*), under which any officer of a limited company who signs on behalf of the company any bill of exchange, promissory note or cheque, in which the name of the company is not mentioned as required by the Act, is personally liable to the holder for the amount unless it is paid by the company.

It is sometimes difficult to determine whether a signature by an agent is the signature of the principal by the hand of his agent, or whether it is the signature of an agent who is merely describing himself as an agent. In such cases it must, if possible, be construed so as to give validity to the bill. Thus if a bill is drawn upon an agent an ambiguous acceptance will, if possible, be construed as the acceptance of the agent in order to give validity to the bill (*n*).

Consideration.

" Valuable consideration for a bill may be constituted by

" (a) any consideration sufficient to support a simple contract;

" (b) an antecedent debt or liability " (*o*).

(*k*) The difference is between signing " A B, Director of the X Company, Limited," in which case the agent is personally liable, and signing " For the X Company, Limited, A B, Director." See and compare *Chapman* v. *Smethurst*, [1909] 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465; *Landes* v. *Marcus*, 25 T. L. R. 478. If an agent signs without having authority to do so he may be sued in an action of deceit if he knew that he had no authority and otherwise upon a warranty of authority (*ante*, Part II., Chapter I.).

(*l*) *Ante*, p. 409.

(*m*) 8 Edw. 7, c. 69.

(*n*) *Mare* v. *Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119; 103 R. R. 831; and see *Herald* v. *Connah*, 34 L. T. 822. Thus, where a bill drawn on a limited liability company called the Fashions Fair Exhibition, Ltd., was accepted by two directors, with the name of the company following their signatures, and was indorsed as follows: " Fashions Fair Exhibition, Ltd., A B, C D, Directors," the name of the company being impressed by a rubber stamp above the names of the directors, it was held (i) that the construction that the signatures on the back were the personal signatures of the directors was the one most favourable to the validity of the instrument in the hands of a holder, because, on this construction, the personal liability of the directors was added to the existing liability of the company; (ii) that the word " Directors " was a word of description only (*Elliott* v. *Bax-Ironside*, [1925] 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631). Held, also, that evidence might be given of the circumstances of the case and of letters that had passed between the plaintiff and the defendants, in order to show that the defendants A B and C D had intended to undertake personal liability (see *ante*, p. 402).

(*o*) S. 27 (1).

Where a bill of exchange is given for an antecedent debt it operates *prima facie* only as a conditional payment (*p*).

Holder for value.—" Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties thereto prior to such time " (*q*).

A bill of exchange is a simple contract, and as between immediate parties the absence of consideration is a defence. But a party to a bill who has himself received no value may be sued by a subsequent holder who has given value to an *intermediate* holder. Thus A, the holder of a bill, negotiates it to B, without receiving value; B negotiates it to C for value; A cannot set up as against C that he has received no consideration, though he can do so as against B. And where a holder for value negotiates a bill he transfers with it all his own rights of action. Thus A, the holder for value of a bill, negotiates it to B without receiving value; B has all A's rights of action against any prior parties to the bill (*r*), though he has no rights of action against A (*s*).

" Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien " (*t*).

It is important to notice that not every person in possession of a bill or note is a " holder " (*u*), and that a " holder " must be distinguished from a " holder for value," and the latter again from a " holder in due course."

" An *accommodation party* to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person."—" An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder

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(*p*) *Currie* v. *Misa*, L. R. 10 Ex., at pp. 163, 164; 1 A. C. 554; 45 L. J. Ex. 852; 35 L. T. 414. See *ante*, p. 177.

(*q*) S. 27 (2). By s. 2 " value " means valuable consideration. As to when a banker is a holder for value of cheques paid in by a customer, see *post*, p. 438.

(*r*) *Milnes* v. *Dawson*, 5 Ex. 948; 20 L. J. Ex. 81.

(*s*) *Holliday* v. *Atkinson*, 5 B. & C. 501; 29 R. R. 299; *Re Whitaker*, 42 Ch. D. 119; 58 L. J. Ch. 487; 61 L. T. 102.

(*t*) S. 27 (3). A person who *discounts* a bill is a holder for full value. See *Theedman* v. *Goldsmidt*, 1 De G. F. & J., at p. 11; and see *Ex p. Schofield*, 12 Ch. D. 337; 48 L. J. Bk. 122; 40 L. T. 823.

(*u*) See definition (*ante*, p. 403, note (*e*).

took the bill, he knew such party to be an accommodation party or not " (*x*).

Holder in due course.—A holder in due course is a holder who has taken a bill—

i. Complete and regular on the face of it.
ii. Before it was overdue.
iii. Without notice of any previous dishonour.
iv. In good faith and
v. For value and
vi. Without notice, at the time when it was negotiated to him, of any defect in the title of the person who negotiated it to him (*y*).

" A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a *party* to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that time " (*z*).

Presumptions of value and good faith.—" Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value " (*a*).—" Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force, or fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill " (*b*).

Negotiation of Bills.—A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the

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(*x*) S. 28 (1) (2). The person accommodated impliedly undertakes to take up the bill when it becomes due, and to indemnify the accommodation party (*Reynolds* v. *Doyle*, 56 R. R. 527; 1 M. & G. 753). But such indemnity does not include costs incurred by the accommodation party in improperly defending an action brought against himself upon the bill (*Beech* v. *Jones*, 5 C. B. 696).

(*y*) S. 29 (1). Examples of defective titles are given by the Act, *e.g.*, when the bill or its acceptance was obtained by fraud or duress or other unlawful means, or for an illegal consideration, or when it is negotiated fraudulently, or in breach of faith (s. 29 (2)). *The original payee of a cheque is not a holder in due course* (*Jones* v. *Waring & Gillow*, [1926] A. C. 670; 95 L. J. K. B. 913; 135 L. T. 548; 42 T. L. R. 644).

(*z*) S. 29 (3).

(*a*) S. 30 (1). But this is only a presumption, which may be rebutted (*Holliday* v. *Atkinson*, 5 B. & C. 501; 29 R. R. 289).

(*b*) S. 30 (2).

transferee the *holder* of the bill.—A bill payable to bearer is negotiated by delivery.—A bill payable to order is negotiated by the indorsement of the holder completed by delivery (*c*).—Where the holder of the bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee, in addition, acquires the right to have the indorsement of the transferor (*d*).—"Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal responsibility" (*e*).

The indorsement must be "written on the bill itself and be signed by the indorser. The simple signature of the indorser on the bill, without additional words, is sufficient" (*f*).—It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees *severally*, does not operate as a negotiation of the bill.—Where a bill is payable to the order of two or more payees or indorsees who are not partners all must indorse, unless the one indorsing has authority to indorse for the others.—Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding if he think fit his proper signature" (*g*).

An indorsement may be (i) *in blank*, *i.e.*, by the simple signature of the indorser without specifying any indorsee; a bill so indorsed becomes payable to bearer (*h*); (ii) *special*, *i.e.*, specifying the person to whom, or to whose order, the bill is to be paid; where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above

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(*c*) S. 31 (1) (2) (3). "Indorsement" in the Act means "indorsement completed by delivery."

(*d*) S. 31 (4). But the transferee has no right to indorse for the transferor (*Harrop* v. *Fisher*, 10 C. B. (N.S.) 196; 30 L. J. C. P. 283; 128 R. R. 670), and he is affected by notice of any fraud received before indorsement by the transferor (*Whistler* v. *Forster*, 14 C. B. (N.S.) 248; 32 L. J. C. P. 161).

(*e*) S. 31 (5). See s. 16 (1), and s. 26.

(*f*) S. 32 (1). Where no room exists on the bill for further indorsements they may be written on an "*allonge*," *i.e.*, a slip of paper attached to it.

(*g*) S. 32 (2) (3) (4).

(*h*) S. 34 (1). See also s. 8 (3), *ante*, p. 404.

the indorser's signature a direction to pay the bill to or to the order of himself or some other person (*i*); (iii) *restrictive*, but it may *not* be *conditional*; if a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (*k*).

"An indorsement is *restrictive* which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof, as, for example, if a bill be indorsed 'Pay D only' or 'Pay D for the account of X' or 'Pay D or order for collection.' A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorise him to do so" (*l*).

"Where a bill is negotiable in its origin (*m*), it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise" (*n*).—"Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had" (*o*).—"A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time" (*p*).—"Except where an indorsement bears date after the maturity of

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(*i*) S. 34 (2) (4). Thus in Form 2, *ante*, p. 400, if John Smith merely writes his name across the back of the bill, it becomes a bill payable to bearer and negotiable by delivery. If John Smith then negotiates the bill to Arthur Robinson, the latter may write above the signature of John Smith the words "Pay to Edward Green." The bill then operates as a special indorsement from John Smith to Edward Green. The provisions of ss. 7 and 8 of the Act (*ante*, p. 404) apply to an indorsee under a special indorsement (s. 34 (3)).

(*k*) S. 33.

(*l*) S. 35 (1) (2). If it authorises transfer, subsequent indorsees have the same rights and liabilities as the first indorsee under the restrictive indorsement (s. 35 (3)).

(*m*) See s. 8 (*ante*, p. 404).

(*n*) S. 36 (1).

(*o*) S. 36 (2). Compare s. 29 (1), *ante*, p. 416.

(*p*) S. 36 (3). What is an unreasonable length of time is a question of fact (*ibid.*). This sub-section applies to cheques (s. 73), but not to notes (s. 86 (3)).

the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue " (*q*).—" Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course " (*r*).

" The rights and powers of the holder of a bill are as follows:

" 1. He may sue on the bill in his own name:

" 2. Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill:

" 3. Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill " (*s*).

General Duties of the Holder.—A bill may, after acceptance, or even before acceptance, pass through the hands of numerous transferees; and there are certain duties, the non-performance of which may altogether deprive a holder of his rights; these duties relate to (1) Presentment for acceptance: (2) Presentment for payment: (3) Notice of dishonour: (4) Noting and protesting.

Presentment for acceptance is necessary in three cases only—

(i) Where a bill is payable *after sight*; here it is necessary in order to fix the maturity of the bill:

(ii) Where a bill expressly stipulates that it shall be presented for acceptance:

(iii) Where it is drawn payable elsewhere than at the residence or place of business of the drawee (*t*).

(*q*) S. 36 (4).

(*r*) S. 36 (5).

(*s*) S. 38. Refer to definition of "holder" (s. 2, *ante*, p. 403). For defects of title, see s. 29 (2), *ante* p. 416, and note that a person claiming under a forgery has not merely a defective title, but has no title, and can give none (s. 24, *ante*, p. 413). For want of consideration as a defence between immediate parties, see *ante*, p. 415.

(*t*) S. 39.

"When a bill payable after sight is negotiated, the holder must either present for acceptance or negotiate it within a reasonable time. If he do not do so, the *drawer* and all *indorsers* prior to that holder are discharged" (*u*).

The presentment must be made by or on behalf of the holder to the drawee or some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue: Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept for all: Where the drawee is dead presentment may be made to his personal representative and when he is bankrupt either to him or his trustee: Where authorised by agreement or usage a presentment through the post office is sufficient (*x*).

Presentment is excused (a) where the drawee is dead, bankrupt, a fictitious person or a person not having capacity to contract by bill; (b) where, after the exercise of reasonable diligence, presentment cannot be effected; (c) where, although the presentment was irregular, acceptance has been refused on some other ground. But the fact that the holder has reason to believe that the bill will be dishonoured does not excuse presentment (*y*).

A bill is deemed to be dishonoured by non-acceptance (i) when it is duly presented for acceptance, and is not accepted within the customary time; (ii) when, on presentment, acceptance is refused or cannot be obtained; (iii) when presentment is excused (*z*). "When a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary" (*a*).

(*u*) S. 40 (1) (2). In determining what is reasonable time regard must be had to the nature of the bill, the usage of trade, and the facts of the case (s. 40 (3)).

(*x*) S. 41 (1). Non-business days are Sunday, Christmas Day, Good Friday, bank holidays, and public fast or thanksgiving days. Any other day is a business day. Wherever under the Act the time limited for doing any act is less than three days, non-business days are excluded (s. 92).

(*y*) S. 41 (2) (3).

(*z*) S. 42; s. 43 (1). The customary time in the case of ordinary trade bills is twenty-four hours (*Bank of Van Diemen's Land* v. *Victoria Bank*, L. R. 3 P. C., at p. 543; 40 L. J. P. C. 28).

(*a*) S. 43 (2). If, however, the holder obtains an acceptance for honour, his right of recourse against the drawer and indorsers is suspended. The right

The holder of a bill may refuse to take a qualified acceptance, and, if he does not obtain an unqualified acceptance, may treat the bill as dishonoured.—A qualified acceptance taken without the express or implied authority or subsequent assent of the drawer or an indorser discharges the drawer or such indorser (*b*).

Presentment for payment.—If a bill is not duly presented for payment the *drawer* and *indorsers* are discharged. If the bill is not payable on demand presentment must be made on the day it falls due: if it is payable on demand, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement to render an indorser liable. Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place, to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if such person can there be found. The proper place of presentment is (a) the place of payment specified in the bill; or (b) if no place is specified, the address of the drawee or acceptor specified in the bill; or (c) if no such place or address is specified, the place of business of the drawee or acceptor, if it is known, or, otherwise, his residence, if known; or (d) in any other case presentment may be made to the drawee or acceptor wherever he can be found, or at his last known place of business or residence. Where a bill is drawn on, or accepted by, two or more persons who are not partners, and no place of payment is specified, presentment must be made to all. Where the drawee or acceptor is dead and no place of payment is specified, presentment must be made to a personal representative, if such there be and he can be found. Where authorised by agreement or usage presentment through the post office is sufficient (*c*).

Delay in making presentment for payment is excused if it is caused by circumstances beyond the control of the holder and not due to his default, misconduct, or negligence; but when the

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of recourse does not give a right of *action* until the holder has given notice of dishonour and, when it is necessary, protested the bill.

(*b*) S. 44 (1) (2). If a drawer or indorser receives notice of a qualified acceptance, and does not within a reasonable time express his dissent, he is deemed to have assented.

(*c*) S. 45. Compare carefully with s. 41 (1) *ante*, p. 420.

cause of delay ceases to operate presentment must be made with reasonable diligence (*d*).

Presentment for payment is excused (a) where, after the exercise of reasonable diligence, it cannot be effected; but the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment; (b) where the drawee is a fictitious person; (c) as regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented; (d) as regards an indorser, where the bill was accepted or made for his accommodation, and he has no reason to expect that the bill would be paid if presented; (e) by express or implied waiver of presentment (*e*).

"A bill is dishonoured by non-payment (a) when it is duly presented for payment and payment is refused or cannot be obtained; (b) when presentment is excused and the bill is overdue and unpaid" (*f*).

"When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder" (*g*).

Notice of dishonour.—"When a bill has been dishonoured by non-acceptance *or* by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

"(1) Where a bill is dishonoured by *non-acceptance*, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

"(2) Where a bill is dishonoured by *non-acceptance* and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted" (*h*).

(*d*) S. 46 (1).
(*e*) S. 46 (2). Compare carefully with s. 41 (2), *ante*, p. 420.
(*f*) S. 47 (1).
(*g*) S. 47 (2). As to the difference between right of recourse and right of action, see *ante*, p. 420, note (*a*). The right of recourse may be lost by refusal to accept payment for honour (s. 68 (7)). (*h*) S. 48.

Notice of dishonour is governed by the following rules (*i*):—

It must be given by or on behalf of a holder or an indorser who, at the time of giving it, is himself liable on the bill: if it is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given: if it is given by or on behalf of an indorser who is entitled to give notice it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

Mere knowledge that the bill has been dishonoured is not sufficient but the notice requires no special form and may be verbal or in writing, provided that it sufficiently identifies the bill and intimates that it has been dishonoured by non-acceptance or non-payment. And a misdescription of the bill does not vitiate the notice unless it misleads the party to whom notice is given: the return of a dishonoured bill to the drawer or an indorser is sufficient notice (*k*).

Notice may be given to a party himself or to his agent; if a party is dead it must be given to his personal representative; if he is bankrupt it may be given either to himself or to his trustee; if there are two or more drawers or indorsers who are not partners notice must be given to all unless one has authority to receive it for the others (*l*).

Notice may be given as soon as the bill is dishonoured and must be given within a reasonable time. If the person giving and the person to receive notice reside in the same place, the notice must be given or sent off in time to reach the latter on the day after dishonour; if they reside in different places the notice must be sent off on the day after dishonour, if there is a post at a convenient hour on that day—otherwise by the next post thereafter.

(*i*) S. 49 (1) (3) (4). If a bill is indorsed by A (drawer), and then by B, C, D, and E, the holder can sue only those who have received notice of dishonour, and he should therefore give notice to all whom he wishes to sue; but if he gives notice to E, who in turn gives notice to D, he can sue D, and so on. Moreover, a notice given by the holder to A or B can be taken advantage of by C, D, E, and subsequent holders, and a notice given by E to A or B can be taken advantage of by C, D, and the holder. The notice may be given by an agent for the person entitled to give it.

(*k*) S. 49 (5) (6) (7); and see *Fielding & Co.* v. *Corry*, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7; 77 L. T. 453.

(*l*) S. 49 (8—11).

Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable or may give notice to his principal; if he gives notice to his principal, he must do so within the same time as if he were a holder and his principal then must give notice within the same time as if the agent had been an independent holder (*m*). If notice is received on a non-business day, it is deemed to have been received on the day following (*n*).

Delay in giving notice of dishonour is excused when it is caused by circumstances beyond the control of the party giving it and is not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence (*o*).

Notice of dishonour is dispensed with:—

(a) When after the exercise of reasonable diligence it cannot be given or does not reach the party sought to be charged.

(b) By waiver, either express or implied, and either before the time for giving notice or after omission to do so.

(c) As regards the drawer (i) where drawer and drawee are the same person; (ii) where the drawee is a fictitious person, or a person not having capacity to contract; (iii) where the drawer is the person to whom the bill is presented for payment; (iv) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill; (v) where the drawer has countermanded payment.

(d) As regards the indorser (i) where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the bill; (ii) where the indorser is the person to whom the bill was presented for payment; (iii) where the bill was accepted or made for his accommodation (*p*).

Noting and protesting.—Where an *inland* bill has been dishonoured, it may, if the holder think fit, be noted for non-acceptance or non-payment, but it is *not necessary to note or protest it* in order to preserve recourse against the drawer or

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(*m*) S. 49 (12—14); and see *Fielding & Co.* v. *Corry* (*ubi supra*).
(*n*) See *ante*, p. 420, note (*x*).
(*o*) S. 50 (1).
(*p*) S. 50 (2).

indorsers. But where a *foreign* bill has been dishonoured by non-acceptance or non-payment it *must be noted and protested*, otherwise the *drawer and indorsers* are discharged (*q*).

Noting and protesting constitute formal evidence of dishonour. When the bill is dishonoured, the holder sends it to a notary public in order that he may make a notarial presentment. The bill, being so presented and again dishonoured, is *noted, i.e.*, the notary makes upon it a memorandum consisting of his initials, the date, the noting charges, and a reference to his register. He also attaches to the bill a slip on which is written the answer obtained upon presentment, *e.g.*, "No effects," or "Payment countermanded." His register contains a copy of the bill and of the answer obtained. The *protest* is a formal certificate of dishonour subsequently drawn up by the notary, containing a copy of the bill and specifying at whose request it was protested, the place and date of protest, the reason for protest, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found (*r*). The bill may be noted on the day of dishonour, and must be noted not later than the next business day (*s*), but the formal protest may be drawn up later and antedated as of the date of noting (*t*). Noting and protesting is dispensed with, and delay is excused upon the same grounds as notice of dishonour (*u*). If the services of a notary cannot be obtained, any householder or substantial resident may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and having the same effect as a formal protest (*x*).

Where the acceptor of a bill becomes bankrupt or insolvent, or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers (*y*).

Duties of the holder as regards the drawee or acceptor.—

(*q*) S. 51 (1) (2). Noting and protesting is also necessary before a bill can be accepted for honour (s. 65 (1), *post*, p. 430).

(*r*) S. 51 (7).

(*s*) S. 51 (4), as amended by s. 1 of the Bills of Exchange (Time of Noting) Act, 1917 (7 & 8 Geo. 5, c. 48).

(*t*) S. 93.

(*u*) S. 51 (9).

(*x*) S. 94.

(*y*) S. 51 (5). The bill may then be accepted for honour.

" When a bill is accepted generally presentment for *payment* is not necessary to render the *acceptor* liable.—When by the terms of a *qualified* acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.—In order to render the acceptor of a bill liable it is not necessary to protest it or that notice of dishonour should be given to him " (*z*). A bill must be exhibited on presentation for payment and delivered up upon payment (*a*).

Liabilities of Parties.—" A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee who does not accept as required by this Act is not liable on the instrument " (*b*).

" The *acceptor* of a bill, by accepting it—

" (1) Engages that he will pay it according to the tenor of his acceptance;

" (2) Is precluded (or estopped) from denying to a holder in due course:

" (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill;

" (b) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but *not* the genuineness or validity of his indorsement;

" (c) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but *not* the genuineness or validity of his indorsement " (*c*).

" The *drawer* of a bill, by drawing it—

" (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser

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(*z*) S. 52 (1) (2) (3).
(*a*) S. 52 (4).
(*b*) S. 53 (1). It is otherwise in Scotland (*id.*, sub-s. 2), and is also subject to an exception in case of cheques drawn by a customer upon his banker (*post*, p. 433).
(*c*) S. 54 (1) (2).

who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

" (b) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse " (*d*).

" The *indorser* of a bill, by indorsing it—

" (a) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

" (b) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

" (c) Is precluded from denying to his immediate or a subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto " (*e*).

As has been already stated, the acceptor is the person primarily liable on the bill; the drawer and indorsers stand in the position of sureties, and are jointly and severally liable to the holder, who may sue all or any of them. As regards the holder, each indorser is in the position of a new drawer, and could not, therefore, for example, set up against him as a defence a forgery on the bill before his own indorsement. As between themselves, each indorser is bound to indemnify subsequent indorsers, though the whole circumstances attendant upon the making, issue, and transference of a bill or note may be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or indorsers (*f*).

(*d*) S. 55 (1).

(*e*) S. 55 (2).

(*f*) *Macdonald* v. *Whitfield*, 8 A. C., at p. 745; 52 L. J. C. P. 70; 49 L. T. 446. In this case three directors of a company agreed to become sureties for a debt of the company, and for that purpose successively indorsed a promissory note of the company. It was held that evidence of the circumstances under which they signed was admissible, and that, in the circumstances, they were not liable to indemnify each other successively in the order of their indorsements, but that they were in the position of co-sureties, and were entitled and liable to equal contribution *inter se*.

"Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liability of an indorser to a holder in due course" (*g*).

Measure of damages.—"Where a bill is dishonoured, the measure of damages, which shall be deemed liquidated damages, shall be as follows:—

"The *holder* can recover *from any party* liable on the bill, and the *drawer* who has been compelled to pay the bill may recover *from the acceptor,* and an *indorser* who has been compelled to pay the bill may recover *from the acceptor, or from the drawer, or from a prior indorser*—

"(a) The amount of the bill:

"(b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case:

"(c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest" (*h*).

Transferor by delivery.—Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a "transferor by delivery." He is not liable on the instrument, but he "warrants" to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (*i*).

Discharge of Bill.—A bill may be discharged, so that *all* rights of action on it, by or against any party, are extinguished, in the following ways:—

1. By payment in due course by or on behalf of the drawee or acceptor. Payment in due course means "payment made at or

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(*g*) S. 56. This section covers the case of a *quasi*-indorser. An indorsement in the strict sense can be made only by a holder, but if a person who is not the holder of a bill signs it with the intention of making himself responsible for payment he is liable as if he were in the strict sense an indorser. See Chalmers' Bills of Exchange, notes to s. 56.

(*h*) S. 57 (1). Where a bill has been dishonoured abroad the amount of re-exchange may in general be recovered in lieu of the above damages (s. 57 (2)). Note that this section deals with interest recoverable as damages, not interest reserved by the bill, which is dealt with by s. 9 (3) *ante*, p. 406). Under this section interest may be withheld (s. 57 (3)).

(*i*) S. 58 (1) (2) (3).

after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective" (*k*). Except in the case of an accommodation bill, payment by the *drawer* or an *indorser* does not discharge the bill, but (a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment against the acceptor, but may not re-issue the bill; (b) where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements and again negotiate the bill (*l*).

2. In case of an *accommodation bill*, by payment in due course by the party accommodated (*m*).

3. In case of a *cheque* by payment by the banker on whom it is drawn in good faith and in the ordinary course of business (*n*).

4. By the acceptor being or becoming the holder of it at or after its maturity, in his own right (*o*).

5. Where the holder of the bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor. Such renunciation must be in writing, unless the bill is delivered up to the acceptor (*p*).

6. By an intentional cancellation of the bill by the holder or his agent, provided that the cancellation is apparent thereon. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative, but the burden of proof lies on the party alleging that it was so made (*q*).

(*k*) S. 59 (1). (*l*) S. 59 (2).
(*m*) S. 59 (3). (*n*) S. 60. See *post*, p. 436.
(*o*) S. 61. See *Nash* v. *De Freville*, [1900] 2 Q. B. 72; 69 L. J. Q. B. 484; 82 L. T. 642.
(*p*) S. 62 (1) (2) (3). The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity (s. 62 (3)). Nothing in the section, however, affects the rights of a holder in due course without notice of the renunciation (*ibid.*). Renunciation must be absolute and unconditional; a mere expression of intent to renounce is insufficient (*Re George, Francis* v. *Bruce*, 44 Ch. D. 627; 59 L. J. Ch. 709; 69 L. T. 49). Delivery must be to the acceptor of a bill or maker of a note; delivery to his devisee is insufficient, though delivery to his executors or administrators might suffice (*Edward* v. *Walters*, [1896] 2 Ch. 157; 65 L. J. Ch. 557; 74 L. T. 396).
(*q*) S. 63 (1) (3). In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his

7. By a material alteration of the bill or the acceptance made without the assent of all parties liable on the bill, *except* as against a party who has himself made, authorised, or assented to the alteration and subsequent indorsers. But, where a bill has been materially altered, but the alteration is not apparent, a holder in due course may enforce payment of it according to its original tenor. *In particular* the following alterations are material namely, any alteration of the date, the sum payable, the time or place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (*r*).

In the case of *Schofield* v. *Londesborough*, the defendant accepted a bill for £500; the bill was stamped to cover a larger amount, and spaces were left so that it was possible to insert further words and figures. The drawer filled up these spaces, altered the amount to £3,500 and indorsed the bill to a holder in due course. It was held that the defendant owed no duty to every possible holder to take precautions against fraud, that he was not, therefore, estopped from denying his liability for £3,500, and was only liable for £500 (*s*).

Acceptance and Payment for Honour.—When a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party liable thereon, may, with the consent of the holder, accept the bill *supra protest* for the honour of any party liable thereon, or for the honour of the person for whose account it is drawn (*t*). The acceptor for honour, by accepting, engages that

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agent. In such a case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged (s. 64 (2)).

(*r*) S. 64 (1) (2). Any alteration other than those stated is also material if it would alter the business effect of the bill. See *Suffell* v. *Bank of England*, 9 Q. B. D., at p. 568; 51 L. J. Q. B. 401; 47 L. T. 416. This section does not apply to Bank of England notes (*Leeds Bank* v. *Walker*, 11 Q. B. D. 84; 52 L. J. Q. B. 590).

(*s*) [1896] A. C. 514; 65 L. J. Q. B. 593; 75 L. T. 254. See also *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559; 75 L. J. P. C. 76; *Bank of Montreal* v. *Exhibit, etc., Co.*, 22 T. L. R. 722. Note the difference between the case in the text and a case where a person hands a blank signed bill or cheque to an agent with authority to fill it up (s. 20, *ante*, p. 411), and also the liability of a customer to his banker (*post*, p. 433).

(*t*) S. 65 (1). It must indicate that it is an acceptance for honour. It may be for part only of the sum for which the bill is drawn (*id.*, sub-s. (2)).

he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided that it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts (*u*). He is liable to the holder and to all parties subsequent to the party for whose honour he has accepted (*x*).

Again, when a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honour of any party liable thereon, or for the honour of the person for whose account it is drawn. Payment for honour *supra protest* must be attested by a notarial "act of honour" appended to the protest. Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for and succeeds to the rights and duties of the holder as regards the party for whose honour he pays and all parties liable to that party (*y*).

Lost instruments.—"Where a bill has been lost before it was overdue, the person who was the holder of it may apply to the *drawer* to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever, in case the bill alleged to have been lost shall be found again. If the drawer, on request, refuses to give such duplicate bill, he may be compelled to do so" (*z*).

Also, in any action or proceeding upon a bill, the Court or a Judge may order that the loss of the instrument shall not be set up, provided a satisfactory indemnity be given against the claims of any other person upon the bill (*a*).

Bills in a set.—When bills have to be sent by post, they are sometimes executed in duplicate or triplicate, and posted separately in case of the possible loss of one part. The whole of the parts then constitute one bill, and payment of one part discharges the whole set. If, however, the drawee accepts more

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(*u*) S. 66 (1). By s. 67 (1), where a dishonoured bill has been accepted for honour, or contains a reference in case of need (*ante*, p. 407), it *must* be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need.

(*x*) S. 66 (2).

(*y*) S. 68.

(*z*) S. 69. There is no power to obtain again either the *acceptance* or an *indorsement*.

(*a*) S. 70.

than one part he is liable to a holder in due course of each part accepted, as if it were a separate bill. And if the holder of a set indorses more than one part he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if each part was a separate bill (*b*).

Conflict of Laws (*c*).—When a bill drawn in one country is negotiated, accepted, or payable in another, "the validity of the bill as regards *requisites in form* is determined by the law of the place of issue; and the validity, as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra protest*, is determined by the law of the place where such contract was made." But "where a bill is issued out of the United Kingdom, it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue"; and "where a bill issued out of the United Kingdom conforms, as regards requisites in form, to the law here, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom." *The interpretation* of the drawing, indorsement, or acceptance, is determined by the law of the place where made; but when an inland bill is indorsed in a foreign country, the indorsement as regards the payer is interpreted according to the law of the United Kingdom. The *duties of the holder* with regard to presentment, protest, and notice of dishonour, are determined by the law of the place where the act is done or the bill is dishonoured; and where the bill is drawn out of but payable in the United Kingdom, the amount of the bill, in the absence of express stipulation, is calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. Where a bill is drawn in one country and payable in another, the date when it is due is determined by the law of the place where it is payable.

Cheques.

Definition.—"*A cheque is a bill of exchange drawn on a banker, payable on demand*" (*d*). Except as otherwise provided,

(*b*) S. 71. (*c*) S. 72. (*d*) S. 73.

the provisions of the Act applicable to a bill of exchange payable on demand apply to a cheque (*e*). " The relation between banker and customer is that of debtor and creditor, with a superadded obligation on the part of the banker to honour the customer's cheques if the account is in credit. A cheque drawn by a customer is in point of law a mandate to the banker to pay the amount according to the tenor of the cheque. It is beyond dispute that the customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud, he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty " (*f*).

It is an implied term of the contract between a banker and his customer that the banker will not, either during the continuance of the relationship, or after it has ceased, disclose to any third person the customer's account and transactions with the bank, or any information relating to the customer or his affairs which he has acquired in his character of banker, except (i) where disclosure is under compulsion of law, as, *e.g.*, under the provisions of the Bankers' Books Evidence Act, or (ii) where there is a duty to the public to disclose, or (iii) where the interests of the bank require disclosure, or (iv) where the disclosure is made by the express or implied authority of the customer as, *e.g.*, where the customer authorises a reference to his banker (*g*).

(*e*) S. 73.

(*f*) *London Joint Stock Bank* v. *Macmillan & Arthur*, [1918] A. C., at p. 879; 88 L. J. K. B. 55; 119 L. T. 387; 34 T. L. R. 509. Here a firm entrusted to a confidential clerk the duty of filling in their cheques for signature. The clerk presented for signature a cheque payable to the firm or bearer in which no sum was written in words and the figures 2 0. 0. were in the space intended for figures. After signature the clerk inserted the words " one hundred and twenty pounds," and wrote the figures 1 and 0 in front and after the figure 2, sufficient space for this being left. It was held, approving *Young* v. *Grote*, 4 Bing. 253; 5 L. J. C. P. 165; 29 R. R. 552, that the firm had been guilty of breach of duty, and that the bank was entitled to debit their account with £120. It may be noted that, if a banker pays money on a customer's cheque to a third person, he cannot recover it on discovering that the customer's account is overdrawn (*Chambers* v. *Miller*, 15 C. B. (N.S.) 125; 32 L. J. C. P. 30; 134 R. R. 479).

(*g*) *Tournier* v. *National Provincial, etc., Bank of England*, [1924] 1 K. B. 461; 93 L. J. K. B. 449; 130 L. T. 682; 40 T. L. R. 214.

The duty and authority of the banker to pay a cheque drawn on him by his customer, are determined (i) by countermand of payment, or (ii) notice of the customer's death (*h*), (iii) by a receiving order being made against the customer, or (iv) by notice that the customer has committed an available act of bankruptcy (*i*), (v) by service of a garnishee order *nisi* which attaches all the customer's balance, even though it exceeds the amount of the debt (*k*).

Presentment for payment.—A cheque must be presented for payment within a reasonable time of its issue. If it is not presented within a reasonable time, and the drawer or person on whose account it is drawn had the right, at the time of such presentment as between him and the banker, to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which he is a creditor of the banker to a larger amount than he would have been had such cheque been paid. But the *holder* of the cheque is a creditor, in lieu of such drawer or person, to the extent of such discharge and entitled to recover the amount from him (*l*). Thus, A draws on his banker a cheque for £50, which is not presented for payment within a reasonable time. Before presentment the banker fails, A having sufficient money to his credit to meet the cheque. A is a creditor of the bank for £50 more than he would have been if the cheque had been paid. A is therefore discharged and, as to that £50, B becomes a creditor in his stead.

In determining what is a reasonable time, regard must be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case (*m*). As a general rule, however, if the banker is in the same place as the person receiving the cheque, it must be presented on the day after it is received, and if he is in a different place, it must be forwarded

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(*h*) S. 75. A banker is not bound to act upon an unauthenticated telegram countermanding payment. His duty in such a case is not to pay at once, but to make enquiries (*Curtice* v. *London City and Midland Bank*, [1908] 1 K. B., at p. 301; 77 L. J. K. B. 341; 24 T. L. R. 176).

(*i*) Bankruptcy Act, 1914, ss. 7, 38.

(*k*) *Rogers* v. *Whiteley*, [1892] A. C. 118; 61 L. J. Q. B. 512; 66 L. T. 303.

(*l*) S. 74 (1) (3).

(*m*) S. 74 (2).

for presentment on the day after it is received and the agent to whom it is forwarded must present or forward it on the day after its receipt (*n*).

Crossed Cheques.—The object of crossing a cheque is to prevent payment otherwise than through a bank. A *general crossing* is constituted by the addition across the face of the cheque either (i) of the words "and company" or any abbreviation thereof between two parallel transverse lines, or (ii) of two parallel transverse lines simply. A *special crossing* is constituted by the addition across the face of a cheque of the name of a banker (usually but not necessarily between parallel transverse lines). The words "*not negotiable*" may be added to either form of crossing (*o*).

A cheque may be crossed generally or specially by the drawer. If it is uncrossed, the holder may cross it generally or specially; if it is crossed generally, he may cross it specially; if it is crossed generally or specially, he may add the words "not negotiable." If a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection; if an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself (*p*). A crossing is a material part of the cheque and no person may obliterate it, or, except as authorised by the Act, add to or alter it (*q*).

"Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had" (*r*).

Duty of bankers as to crossed cheques.—"Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection being a banker, the banker on whom it is drawn shall refuse payment thereof."—"Where the banker on whom a cheque is drawn which is so crossed nevertheless pays

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(*n*) *Alexander* v. *Burchfield*, 7 M. & Gr. 1061; 11 L. J. C. P. 253; *Heywood* v. *Pickering*, L. R. 9 Q. B. 428; 43 L. J. Q. B. 145.
(*o*) S. 76 (1) (2).
(*p*) S. 77 (1—6).
(*q*) S. 78.
(*r*) S. 81.

the same, *or* pays a cheque crossed generally otherwise than to a banker *or*, if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection being a banker, he is liable to the *true owner* of the cheque for any loss he may sustain owing to the cheque having been so paid."—But where a cheque which is presented for payment does not appear to be crossed, or to have had the crossing obliterated, or altered otherwise than is authorised by the Act, and is in consequence paid contrary to the above provisions, a banker paying in good faith and without negligence is not responsible and incurs no liability, nor can the payment be questioned (*s*).

Protection to bankers.—"When a bill payable to order on demand (*i.e., a cheque*) is drawn on a banker and *the banker on whom it is drawn* pays the bill *in good faith and in the ordinary course of business*, it is not incumbent on the banker to show that the *indorsement* of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority" (*t*).

This section does not protect a banker when the *drawer's* signature has been forged. Nor does it protect him if he pays the cheque otherwise than in the ordinary course of business, *e.g.*, if he pays a crossed cheque otherwise than through a banker or through the banker to whom it is crossed (*u*). Where a banker pays a cheque upon a forged indorsement, the true owner of the cheque can recover the amount from the person to whom it is paid (*x*), and if the cheque was crossed and paid in contravention of the crossing, he can also recover from the banker (*y*). And, if the drawer chooses to waive the banker's mistake, he can recover from the person to whom the money was paid (*z*).

"Where the banker on whom a crossed cheque is drawn, in

(*s*) S. 79 (1) (2). It will be observed that, whereas ordinarily a banker is liable only to his own customer, this section makes him liable to the true owner of the cheque.

(*t*) S. 60. Note that this is an exception to s. 24.

(*u*) *Smith* v. *Union Bank of London*, L. R. 10 Q. B., at p. 296. Affirmed, 1 Q. B. D. 31; 45 L. J. Q. B. 149; 33 L. T. 557.

(*x*) *Ogden* v. *Benas*, L. R. 9 C. P. 513; 43 L. J. C. P. 259.

(*y*) S. 79 (1), *supra*.

(*z*) *Bobbett* v. *Pinkett*, 1 Ex. D. 373; 45 L. J. Ex. 555.

good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner " (*a*).

" Where a banker in good faith and without negligence *receives payment for a customer* of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment " (*b*). Under this section, it was held that a banker gained no protection if he placed the amount of a cheque to the customer's credit before it was collected, but by the *Bills of Exchange* (*Crossed Cheques*) *Act*, 1906 (*c*), it is provided that " a banker receives payment of a crossed cheque for a customer within the meaning of section 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof." The banker gains no protection by himself crossing the cheque, to be within the section it must be crossed when he receives it (*d*). A banker who receives from a private customer, for collection on his own account, a cheque payable to and indorsed by a public official, is guilty of negligence if he credits the customer with the proceeds without making any enquiry (*e*); but he is not negligent within the meaning of this section if he collects a cheque signed

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(*a*) S. 80.

(*b*) S. 82. The mere fact that the customer's account is overdrawn, so that the banker, by collecting the cheque, receives payment of the overdraft, does not deprive him of the protection given by this section (*Clarke* v. *London and County Banking Co.*, [1897] 1 Q. B. 552; 66 L. J. Q. B. 915; 76 L. T. 293). There must be some sort of an account to make a man a customer of a banker (*Great Western Railway* v. *London and County Banking Co.*, [1901] A. C., at p. 421; 70 L. J. K. B. 915. It is not sufficient that he has been in the habit of getting cheques cashed at the bank (*id.*). But it is sufficient if the account was opened on the day before paying in the cheque (*Taxation Commissioners* v. *English, etc., Bank*, [1920] A. C. 683; 89 L. J. P. C. 181).

(*c*) 6 Edw. 7, c. 17, s. 1.

(*d*) *London City and Midland Bank* v. *Gordon*, [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574.

(*e*) *Ross* v. *London County, Westminster and Parr's Bank*, [1919] 1 K. B. 678; 88 L. J. K. B. 927; 120 L. T. 636.

per pro. without enquiring into the authority of the agent so signing (*f*).

Recent cases of importance upon more than one point are those of *Underwood, Ltd.* v. *Bank of Liverpool* and *Underwood, Ltd.* v. *Barclays Bank* (*g*). In these cases, a man named Underwood was the sole director of a company named Underwood & Co., Ltd., into which he had converted himself, and in which he held all the shares except one. He fraudulently took cheques of the company, which he had authority to indorse, paid them in to the defendant banks, with which he had private accounts, and converted the proceeds. An action for conversion was brought against the banks by the company on behalf of a debenture-holder. It was held (i) that Underwood, in paying into his own account the cheques of his principal, the company, was not acting within the scope of his apparent authority in such circumstances that the company would be precluded from setting up lack of actual authority, but was doing something unusual which ought to have put the banks upon enquiry, and, moreover, was not purporting to act as the company's agent, but as being himself the company, and was so dealt with by the banks (*h*); (ii) that, so far as concerns such of the cheques as were crossed, the banks had not the protection of s. 82 of the Act because they had acted negligently in cashing the cheques without enquiry; (iii) that the mere fact that the banks in their books entered the value of the cheques on the credit side of the account on the day on which they received the cheques for collection did not without more constitute them holders for value. To constitute value there must be in such a case a contract between banker and customer, express or implied, that the bank will, before receipt of the proceeds, honour cheques of the customer drawn against the cheques; such a contract can, however, be established by course of business and may be established by entry in the customer's pass-book, communicated to the customer and acted upon by him (*i*).

(*f*) *Monson* v. *London County and Westminster Bank*, [1914] 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481. This is not affected by s. 25 (*ante*, p. 413), which is one of a group of selections dealing with the capacity and authority of the parties to the instrument, and has no reference to rights and liabilities arising after discharge (*ibid.*).

(*g*) [1924] 1 K. B. 775; 93 L. J. K. B. 690; 131 L. T. 271; 40 T. L. R. 302.

(*h*) See *ante*, pp. 223, 224.

(*i*) Conversely the existence of such a contract may be rebutted by notices

Promissory Notes.

Definition and form.—"*A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer* (*j*).

"A note which is, or on the face of it purports to be, both made and payable within the British Islands is an *inland note*. Any other note is a foreign note" (*k*).

"A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer" (*l*).

"A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally according to its tenor. Where a note runs "I promise to pay," and is signed by two or more persons, it is deemed to be their joint and several note" (*m*).

Presentment for payment.—"Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged. Where a note payable on demand has been negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that a reasonable time for presenting it for payment has elapsed since its issue" (*n*).

Presentment for payment is not necessary in order to render the maker liable unless the note is in the body of it made payable at a particular place, but it is always necessary in order to render an *indorser* liable, and if the note is made payable at a particular place the presentment must be at that place in order to render an indorser liable (*o*).

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in the pass-book and paying-in slips or other evidence to show that the customer could not draw before the cheques were collected (*Re Farrow's Bank, Ltd.*, [1923] 1 Ch. 41; 92 L. J. Ch. 153; 128 L. T. 332).

(*j*) S. 83 (1).
(*k*) S. 83 (4).
(*l*) S. 84.
(*m*) S. 85 (1) (2).
(*n*) S. 86 (1) (3).
(*o*) S. 87 (1) (2) (3).

Liability of maker.—The maker of a promissory note, by making it—

1. "Engages that he will pay it according to its tenor;
2. Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse" (*p*).

The following provisions as to bills do not apply to notes, namely, those relating to (i) presentment for acceptance; (ii) acceptance; (iii) acceptance *supra protest*; (iv) bills in a set; also, where a foreign note is dishonoured, protest is unnecessary. Otherwise, save as already noted in this section, the provisions of the Act relating to bills of exchange apply with the necessary modifications to promissory notes, the maker of a note being deemed to correspond with the acceptor of a bill, and the first indorser of a note with the drawer of an accepted bill payable to drawer's order (*q*).

(*p*) S. 88. (*q*) S. 89.

CHAPTER VI.

LANDLORD AND TENANT.

In English law all land is the subject of tenure, so that every holder of land is, strictly speaking, a tenant. In early times, nevertheless, a great distinction was drawn between feudal tenants in fee or for life and tenants who held merely for a term of years, however long. Only the interests of the former were regarded as *property*, the relation between a termor and his landlord being regarded merely as *contractual*, and not giving the former any right to the possession of the land either against third persons or even against the landlord himself, though as against the latter he might have an action for damages if dispossessed by him. Gradually, however, the interest of a tenant for a term of years, or from year to year, or even for lesser periods, was recognised as property, though it was included in personal property as a chattel real. The proprietary rights of all such tenants are part of the Law of Property, and are outside the scope of this chapter, which will deal only with the contractual relationship of landlord and tenant.

What is a tenancy.—The relationship of landlord and tenant is created either by a grant by one person to another of an estate in lands or other hereditaments less than freehold and less than that of the grantor, who retains the reversion, or when one person holds the land of another under a tenancy at will or on sufferance.

By s. 1 (1) of the Law of Property Act, 1925, the only estates in land which are capable of subsisting or of being conveyed or created at *law* are an estate in fee-simple in possession and a *term of years absolute*. The latter expression means a term of years either certain or liable to determination by notice, re-entry, operation of law, or, as in the case of a term created by way of mortgage, by a provision for cesser on redemption, or in any other event; but it does not include any term of years determinable

with life or lives or with the cesser of a determinable life interest: the expression "term of years" includes a term for less than a year, or for a year or years, and a fraction of year or from year to year (*a*). To constitute a tenancy, the following conditions must be complied with:—

1. The grantor must not grant the whole of his interest. Thus, if A is the lessee of X and grants to B *part* of the unexpired term, he creates an underlease, and B becomes tenant to him and not to X. But if A grants to B the *whole* of the unexpired term, that constitutes an assignment (*b*), which can create a tenancy only between B and X.

2. The grantee must have exclusive possession and not merely a licence. Thus, in the case of *Wilson* v. *Tavener* the defendant agreed to let the plaintiff erect a hoarding for advertisements on the forecourt of a cottage, and to use the gable end of a cottage for the same purpose. It was held that, as the agreement did not give the plaintiff the right to the exclusive possession of any property or building of the defendant, its effect was merely to create a licence, which was revocable on reasonable notice (*c*).

(*a*) Law of Property Act, 1925, s. 205 (1) (xxvii). It apparently, therefore, includes quarterly, monthly and weekly tenancies, but not tenancies at will or on sufferance.

(*b*) This is so, even though the grant is in form an underlease (*Beardman* v. *Wilson*, L. R. 4 C. P. 57; 38 L. J. C. P. 91; 19 L. T. 282).

(*c*) [1901] 1 Ch. 578; 70 L. J. Ch. 263; 84 L. T. 48. Compare *Hancock* v. *Austin*, 14 C. B. (N.S.) 634 (where a mere licence to place machinery in a room was distinguished from a demise of the room). See also *Frank Warr & Co., Ltd.* v. *London County Council*, [1904] 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368; 20 T. L. R. 346 (where an agreement between the lessee of a theatre and the plaintiffs, whereby the latter had the exclusive right of supplying refreshments, and for that purpose had the necessary use of various rooms and cellars, was held merely to confer upon the plaintiffs a licence to use those parts of the premises); *Jackson* v. *Simons*, [1923] 1 Ch. 373; 92 L. J. Ch. 161; 128 L. T. 572; 39 T. L. R. 147 (where merely a licence was held to have been created by an agreement by a lessee of a shop to allow a portion of a shop to be used between 10.30 P.M. and 2 A.M. by the proprietor of a night club for the sale of tickets of admission to the club, the part so used being partitioned off from the rest of the shop by a screen erected each night and fixed in position by a padlock of which the lessee retained the key). A person who lives in a boarding-house or in lodgings where attendance is provided by the landlord is a licensee (*London & North Western Railway* v. *Buckmaster*, L. R. 10 Q. B., at p. 76; 44 L. J. M. C. 180; 33 L. T. 329). When a person occupies rooms without attendance, the question whether he is a tenant or a licensee depends on the circumstances of the case, the real question involved being whether the premises have become two separate dwelling-houses, or whether there is still but one dwelling-house over which the landlord exercises a control as master (see *Kent* v. *Fittall*, [1906] 1 K. B. 60; 75 L. J. K. B. 310; 94 L. T. 76; 22 T. L. R. 63).

As to a *licence*, the following points should be noted: A bare licence, *i.e.*, a licence not coupled with a grant, "passes no interest, but only makes an action lawful which without it had been unlawful" (*d*): it is personal, and not assignable by the licensee (*e*), and does not bind the assignee of the licensor (*f*): even when it is exclusive it gives the licensee no rights against third persons (*g*), except in respect of their actual *interference* with his exercise of his own right (*h*): it is revocable at any time, although created by deed or given for valuable consideration, but, if there is an express or implied contract not to revoke it for a certain period, an action for damages will lie for breach of the contract (*i*).

3. The occupation of the tenant must be of right and not as a necessary incident of service. Thus if a servant, as part remuneration for his services, is *permitted* to occupy a house belonging to his master, he is a tenant; but the relationship of landlord and tenant is not created because a servant, with a view to the efficient performance of his services, is *required* to occupy a residence allotted to him by his master (*k*).

4. At Common Law it was necessary, except in the case of an instrument taking effect under the Statute of Uses, that there

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(*d*) *Thomas* v. *Sorrell*, Vaugh. 351, cited in *Muskett* v. *Hill*, 5 Bing. (N.C.), at p. 705; see also *Heap* v. *Hartley*, 42 Ch. D., at p. 468; 58 L. J. Ch. 790; 61 L. T. 538.

(*e*) *Muskett* v. *Hill* (*ubi supra*).

(*f*) *Roffey* v. *Henderson*, 17 Q. B. 574; 21 L. J. Q. B. 49 (licence by landlord to his tenant to take away fixtures after the expiration of the lease held not to bind the incoming tenant).

(*g*) *Hill* v. *Tupper*, 2 H. & C. 121; 8 L. T. 792. Here, A having granted to B the "sole and exclusive right" to let out boats for hire on the Basingstoke Canal, it was held that B could not maintain an action in his own name against another person who also let out boats for hire upon the canal. Compare *Heap* v. *Hartley* (*ubi supra*), where it was held that a person who had an exclusive licence to use a patented invention within a specified district could not bring an action in his own name against another person who used the invention within that district.

(*h*) *Nuttall* v. *Bracewell*, L. R. 2 Ex., at p. 12; 36 L. J. Ex. 1.

(*i*) *Guyot* v. *Thompson*, [1894] 3 Ch. 388; 64 L. J. Ch. 32; 71 L. T. 416; *Kerrison* v. *Smith*, [1897] 2 Q. B. 445; 66 L. J. Q. B. 762; 77 L. T. 344; *Hurst* v. *Picture Theatres, Ltd.*, [1915] 1 K. B. 1; 83 L. J. K. B. 1837; 111 L. T. 972; 30 T. L. R. 642. In the last case it was held that the licence granted by the sale of a ticket for a seat at a theatre includes a contract not to revoke the licence arbitrarily during the performance. It was also held that, since the Judicature Act, 1873, the case of *Wood* v. *Leadbitter* (13 M. & W. 838), is no longer law.

(*k*) *Fox* v. *Dalby*, L. R. 10 C. P. 285; 44 L. J. C. P. 42; 31 L. T. 478.

should have been an actual entry by the tenant (*l*): before entry the grantee had merely an *interesse termini*, which was, however, a right of property enabling him to maintain an action against any person through whom his entry was prevented (*m*). But by s. 149 of the *Law of Property Act*, 1925, the doctrine of *interesse termini* is abolished and all terms of years absolute, whether created before or after 1926, are capable of taking effect, both at law and in equity, from the date fixed for the commencement of the term, without actual entry; with the exception, however, of certain terms taking effect in equity, any term at a rent or granted in consideration of a fine, limited after the commencement of the Act to take effect more than twenty-one years from the date of the instrument purporting to create it is void.

5. Lastly, it is essential to every term of years absolute that the beginning and the end should be certain or capable of being ascertained with certainty (*n*).

Creation of Tenancies.

Tenancies for a term of years can be created only by a lease or agreement for a lease. At Common Law a lease of a corporeal hereditament for a term of years could be made by parol. But by s. 54 of the *Law of Property Act*, 1925 (re-enacting, in substance, s. 1 of the Statute of Frauds) all interests in land not put in writing, and signed by the parties creating them, or their agents thereunto lawfully authorised *by writing* shall have the force and effect of interests at will only, *except* in the case of leases taking effect in possession for a term not exceeding three years at the best rent which can reasonably be obtained without taking a fine. And by s. 52 of the *Law of Property Act*, 1925 (re-enacting, in substance, s. 3 of the Real Property Act, 1845), every lease or tenancy which is required by law to be in writing must be by deed. An *agreement for a lease*, however short, falls within s. 40 of the *Law of Property Act*, 1925 (re-enacting, in

(*l*) See Williams' Real Property, p. 600.

(*m*) *Gillard* v. *Cheshire Lines Committee*, 32 W. R. 393. But it did not enable him to maintain an action for trespass (*Wallis* v. *Hands*, [1893] 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428).

(*n*) Co. Litt. 45 b; *Marshall* v. *Berridge*, 19 Ch. D. 233; 51 L. J. Ch. 329; 45 L. T. 599; *Edwards* v. *Jones*, 124 L. T. 740; *Rawlinson* v. *Ames*, [1925] Ch., at p. 99; 94 L. J. Ch. 113; 132 L. T. 370.

substance, a similar provision of s. 4 of the Statute of Frauds (*o*)), and either the agreement or some note or memorandum thereof must be in writing, signed by the party to be charged or his agent (*o*); this section does not, however, affect the law relating to part performance, so that specific performance may be obtained of an oral agreement of which there has been part performance by the plaintiff (*p*).

At Law a tenant who entered under a lease which was void because not under seal or under an agreement for a lease was merely a tenant at will until he had paid rent referable to some aliquot part of a year, after which he became a tenant from year to year, subject to such provisions of the agreement as were applicable to a yearly tenancy (*q*). In the Courts of Chancery, however, if the agreement was one of which specific performance would be granted, the tenant was considered to have, under the agreement, an equitable estate corresponding to the legal estate which he would have had if a lease had been actually executed in the terms of the agreement. But, since the Judicature Act, 1873, there are no longer two estates (*i.e.*, one estate at Common Law, by reason of the entry and payment of rent, and one estate in Equity under the agreement); there is only one Court, and the Equity rules prevail in it: accordingly, a tenant who holds under an agreement for a lease *of which he is entitled to obtain specific performance* (*r*) now stands as against the other party to the agreement in the same position as if the lease had been executed, and every branch of the High Court must give him the same rights (*s*). Moreover, a document which purports to be a lease

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(*o*) *Ante*, p. 71.

(*p*) Wilshere's Equity, chapter XIII., and see *Brough* v. *Nettleton*, [1921] 2 Ch. 25; 90 L. J. Ch. 373; 124 L. T. 823; *Rawlinson* v. *Ames* (*ubi supra*).

(*q*) *Martin* v. *Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 43; 30 L. T. 268; *Braythwayte* v. *Hitchcock*, 10 M. & W. 494; 12 L. J. Ex. 38; *Swaine* v. *Ayres*, 21 Q. B. D., at p. 293; 57 L. J. Q. B. 428.

(*r*) *Swaine* v. *Ayres* (*ubi supra*).

(*s*) *Walsh* v. *Lonsdale*, 21 Ch. D., at p. 14; 52 L. J. Ch. 2; 46 L. T. 858. But this principle applies (i) only as between the parties to the agreement and (ii) only when posession of the legal title would at law justify some act or enable some action to be maintained, and (iii) only in a Court which could decree specific performance of the agreement (*Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch., at pp. 617, 618; 70 L. J. Ch. 814; 82 L. T. 347; 16 T. L. R. 299). The principle does not therefore apply to proceedings in the County Court if the agreement is one of which a County Court has no juris-

but is void because not made by deed may be treated as an agreement for a lease which is capable of being specifically enforced (*t*).

Tenancies from year to year may be created—

1. By express lease or agreement for a lease from year to year.

2. By entry and payment of a part of a yearly rent under a lease which is void because not made by deed, or under an oral agreement of which specific performance would not be granted.

3. By entry and payment of rent without any lease or express agreement. Payment or receipt of rent, if unexplained, is an admission of a tenancy, which, in the absence of any evidence to the contrary, is deemed to be a tenancy from year to year—at any rate, where it is paid in respect of premises ordinarily let from year to year; but either the receiver or payer may prove the circumstances under which such payment was made so as to rebut the presumption which would otherwise arise from its receipt or payment (*u*). An acknowledgment by a person in possession of premises that he holds them as tenant at a certain rent also creates a tenancy (*x*).

4. By holding over after the termination of a tenancy for years without any express new bargain, in which case the tenant becomes a tenant from year to year upon the terms of the original tenancy, so far as they are applicable to a yearly tenancy (*y*).

Tenancies for other periods, *e.g.*, monthly or weekly tenancies, may arise in the same ways as tenancies from year to year, but are usually created by express agreement.

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diction to grant specific performance (*Foster* v. *Reeves*, [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; 67 L. T. 537).

(*t*) *Martin* v. *Smith*, L. R. 9 Ex. 50; 43 L. J. Ex. 42; 30 L. T. 268; *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577; 72 L. J. K. B. 103; 88 L. T. 46; 19 T. L. R. 189.

(*u*) *Doe* d. *Lord* v. *Crago*, 6 C. B., at p. 98. See also *Smith* v. *Wedlake*, 3 C. P. D. 10; 47 L. J. Q. B. 282.

(*x*) *Yeoman* v. *Ellison*, L. R. 2 C. P. 681; 36 L. J. C. P. 226; 17 L. T. 65. A tenancy may also be created by *attornment*, which occurs usually as a result of an attornment clause in a mortgage, by which the mortgagor agrees to hold the mortgaged property as tenant to the mortgagee at a specified rent (*ante*, p. 384); and see *Kearsley* v. *Philips*, 11 Q. B. D. 621; 52 L. J. Q. B. 581; 48 L. T. 468.

(*y*) *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736; 62 L. J. Q. B. 462; 68 L. T. 699; *Wedd* v. *Porter*, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243; *Croft* v. *William F. Blay, Ltd.*, [1919] 2 Ch. 343; 121 L. T. 18; 35 T. L. R. 556; *Lowther* v. *Clifford*, [1927] 1 K. B., at p. 149.

Tenancies at will may be created—

1. By lease or agreement for a lease, expressly providing that the tenancy shall be at will (*z*).

2. By implication of law, where a person becomes tenant of premises with the consent of the owner, but without any express or implied agreement as to the length of time during which his tenancy is to last (*z*). Thus a person is a tenant at will if he is allowed to occupy premises rent free (*a*), or if he is let into possession of premises during negotiations for their sale or letting to him (*b*), or if he enters under a void lease and has not yet paid any part of a yearly rent (*c*).

A tenancy on sufferance arises where a tenant, after his term has expired, continues in possession without the consent of his landlord.

Before 1873 a mortgagor who remained in possession after execution of a mortgage deed was, in the absence of any agreement creating a tenancy between himself and the mortgagee, in the same position as a tenant on sufferance (*d*). At Common Law he could not, therefore, bring any action in respect of the mortgaged land, nor could he make any lease binding the mortgagee without the latter's consent. Now, however, by s. 98 (1) of the *Law of Property Act*, 1925 (re-enacting s. 25 (5) of the Judicature Act, 1873), a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract

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(*z*) *Richardson* v. *Langridge*, 4 Taunt. 128; *Doe* v. *Cox*, 11 Q. B. 122; 17 L. J. Q. B. 3. But if the duration of the tenancy is specified, it does not become a tenancy at will merely by reason of a stipulation that one of the parties may determine it without notice (*Re Threlfall*, 16 Ch. D. 274; 50 L. J. Ch. 318).

(*a*) *Doe* v. *Jones*, 10 B. & C. 718; *Doe* v. *McKaeg*, *id.* 721; *Doe* v. *Groves*, 10 Q. B. 486; 16 L. J. Q. B. 297.

(*b*) *Doe* v. *Rock*, 1 C. & M. 549.

(*c*) *Ante*, p. 446.

(*d*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; *Scobie* v. *Collins*, [1895] 1 Q. B. 375; 64 L. J. Q. B. 10; 71 L. T. 775.

made by him jointly with any other person. And s. 99 of the *Law of Property Act*, 1925 (replacing similar provisions of the Conveyancing Acts, 1881 and 1911), now allows certain leases to be made, on terms specified therein, by a mortgagor in possession.

Termination of Tenancies.

A tenancy for a fixed term comes to an end at the expiration of the term. A yearly or other periodical tenancy is determined by notice given at the proper interval of time before the termination of the year or other period. A tenancy at will may be determined by notice given at any time (*e*). In the case of a tenancy on sufferance, demand for possession may be made by the landlord at any time without notice. Tenancies may also be determined by forfeiture, surrender or merger, and in some cases by disclaimer by the trustee in bankruptcy of the tenant (*f*).

Notice to Quit.—A tenant for a fixed term is not generally entitled to receive, nor bound to give, notice to quit. But, by s. 23 of the *Agricultural Holdings Act*, 1923 (*g*), in the case of a tenancy of a "holding" within the Act, for a term of two years or upwards, the tenancy does not terminate unless, not less than one year nor more than two years before the date fixed for its expiration, a written notice has been given by either party to the other of his intention to terminate the tenancy; if no such notice is given the tenancy, after the expiration of the term, will continue as a tenancy from year to year, but otherwise, so far as applicable, on the terms of the original tenancy: the section, however, does not apply to any tenancy granted, or agreed to be

(*e*) *Doe* v. *McKaeg*, 10 B. & C. 721; *Doe* v. *Price*, 9 Bing. 356.
(*f*) *Post*, p. 459.
(*g*) This Act is the latest of a series of Acts beginning in 1875, whose principal objects were to improve the condition of agricultural tenants by allowing them compensation for improvements, by relieving them from the hardships of the common law rules relating to fixtures, and by giving them greater security of tenure. By s. 57 of the Act the term "holding" does not include an allotment garden or land cultivated as a garden unless cultivated wholly or mainly for the purpose of the trade or business of market gardening, but save as aforesaid, it means "any parcel of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral, or in whole or in part cultivated as a market garden and which is not let to the tenant during his continuance in any office, appointment, or employment held under the landlord."

granted, before January 1, 1921, but, in any case, in which it does apply, it cannot be excluded by any agreement to the contrary.

In the case of periodic tenancies, the question of notice to quit is regulated by (i) agreement, (ii) Common Law, and (iii) statute.

(i) A landlord and tenant may make any stipulation that they please with regard to notice to quit, and may provide that it shall be of any length (*h*), or that no notice on either side shall be necessary (*i*).

(ii) In the absence of express stipulation, a tenant from year to year is entitled to, and must give, a half-year's notice to quit, expiring on the date on which the tenancy commenced (*k*). If the tenancy begins on one of the usual quarter days, a customary half-year's notice is sufficient—*i.e.*, notice given before one quarter day for the second succeeding quarter day (*l*)—but if it begins on any other day the notice must be a full half-year's notice of 182 days, excluding the day on which it is given and including the day on which it expires (*m*). Where there is an express tenancy for a fraction of a year and a year or period of years, and the tenancy is continued from year to year by holding over, the notice must expire on the anniversary of the termination of the original tenancy and not on that of its commencement (*n*).

(*h*) Thus there may be a tenancy from year to year, with a stipulation for three months' notice to quit (*King* v. *Eversfield*, [1897] 2 Q. B. 475; 66 L. J. Q. B. 809; 77 L. T. 195), or terminable at the will of the lessor (*Re Threlfall*, 16 Ch. D. 274; 50 L. J. Ch. 318). See also *Alison* v. *Scargall*, [1920] 3 K. B. 443; 89 L. J. K. B. 1084; 123 L. T. 815; 36 T. L. R. 708.

(*i*) *Bethell* v. *Blencowe*, 3 M. & G. 119.

(*k*) *Right* v. *Darby*, 1 T. R. 159; *Mayo* v. *Joyce*, [1920] 1 K. B., at p. 826; 89 L. J. K. B. 561; 122 L. T. 777. Where there is a yearly tenancy, a stipulation that it may *at any time* be determined by three months' notice does not enable it to be terminated by a notice expiring before the end of the first year (*Id.*; compare, however, *Soames* v. *Nicholson*, [1902] 1 K. B. 157; 71 L. J. K. B. 24; 85 L. T. 614).

(*l*) *Morgan* v. *Davies*, 3 C. P. D. 260.

(*m*) *Right* v. *Darby* (*ubi supra*); *Sidebotham* v. *Holland*, [1895] 1 Q. B., at p. 384; 64 L. J. Q. B. 200; 72 L. T. 62; *Meggeson* v. *Groves*, [1917] 1 Ch. 158.

(*n*) *Croft* v. *William F. Blay, Ltd.*, [1919] 2 Ch. 343; 121 L. T. 18; 33 T. L. R. 556. If a yearly tenant has entered during a quarter and has paid rent for that broken quarter and subsequently has paid rent at the regular quarter days, his yearly tenancy begins at the end of the broken quarter (*Id.*); but it is otherwise if the tenancy agreement expressly provides that the yearly tenancy shall begin at the date of entry (*Sidebotham* v. *Holland* (*ubi supra*)).

In the case of periodic tenancies less than yearly tenancies the notice should correspond with the period of the tenancy, *i.e.*, it should be a calendar month's notice in a monthly tenancy, and a calendar week's notice in a weekly tenancy, and should terminate at the end of the current month or week (*o*).

(iii) By s. 25 of the *Agricultural Holdings Act*, 1923, it is provided that, *notwithstanding any provision to the contrary in a contract of tenancy*, a notice to quit a "holding" within the definition of the Act shall be invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the current year of the tenancy. This section does not, however, extend to a case where a receiving order in bankruptcy is made against the tenant, nor does it apply to (i) notice given by the Admiralty, War Department or Air Council, under the provisions of any agreement of tenancy, where possession of the land is required for naval, military, or air-force purposes; (ii) notice given by a corporation carrying on a railway, dock, canal, water, or other undertaking in respect of any land acquired by the corporation for the purposes of its undertaking, or by a government department or local authority where possession of the land is required by the corporation, government department or authority for the purpose (not being the use of the land for agriculture) for which it was acquired by the corporation, department or authority, or appropriated under any statutory provision; (iii) any notice given in pursuance of a provision in the contract of tenancy authorising the resumption of possession of the holding or some part thereof for some specified purpose (not being the use of the land for agriculture); (iv) any notice given by a tenant to a sub-tenant.

This section applies not only to yearly tenancies but to all tenancies in which a notice to quit is necessary; it applies therefore to a lease for twenty-one years giving an option to either party to determine it at the end of the first seven or fourteen years by six months' notice in writing (*p*).

(*o*) *Queen's Club, etc., Estates* v. *Bignell*, [1924] 1 K. B. 117; 93 L. J. K. B. 107; 130 L. T. 26; 39 T. L. R. 496; *Precious* v. *Reedie*, [1924] 2 K. B. 149; 93 L. J. K. B. 800; 131 L. T. 568; 40 T. L. R. 574; *Newman* v. *Slade*, [1926] 2 K. B. 328; 95 L. J. K. B. 894; 135 L. T. 640; 42 T. L. R. 607.

(*p*) *Edell* v. *Dulieu*, [1924] A. C. 38; 93 L. J. K. B. 286; 130 L. T. 390; 40 T. L. R. 84.

By s. 26 of the *Agricultural Holdings Act*, 1923, it is also provided that on the making of any contract for sale of a " holding " or any part of a " holding " held by a tenant from year to year, any current and unexpired notice to determine the tenancy given either before or after the commencement of the Act shall, if the contract of sale is made by the person by whom the notice to quit was given, be null and void unless the tenant has, prior to such contract of sale, agreed in writing that such notice shall be valid. This section does not, however, apply to a contract for sale to a government department or local authority for the purpose of providing small holdings or allotments, or for any other public purpose made before August 20, 1922.

(iv) By s. 1 of the *Allotments Act*, 1922, it is provided that where land is let on a tenancy for use by the tenant as an allotment garden, or is let to any local authority or association for the purpose of being sub-let for such use, the tenancy shall not (except as provided by the section) be terminable by the landlord by notice to quit or re-entry, notwithstanding any agreement to the contrary, except by six months or longer notice to quit, expiring on or before April 6, or on or after September 29 in any year, or under one of the powers of re-entry specified in the section.

A notice to quit need not be in any particular form, nor need it even be in writing (*q*), but it must be a " clear, distinct and unambiguous notice " of the determination of the party giving it to terminate the existing tenancy at a certain time (*r*): and it must not be conditional or optional (*s*); but a notice is not optional merely because the landlord adds an offer for a new tenancy at an

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(*q*) *Doe* v. *Crick*, 5 Esp. 196.

(*r*) See *Bury* v. *Thompson*, [1895] 1 Q. B. 231, 696; 64 L. J. Q. B. 500; 72 L. T. 187; *Phipps & Co.* v. *Rogers*, [1925] 1 K. B. 14; 93 L. J. K. B. 1009; 132 L. T. 140. It is not, however, necessary that it should be clear and unambiguous in its expressed terms provided that it can be rendered so by the application of the maxim " *Id certum est quod certum reddi potest.*" The Court may impute to the tenant knowledge which renders clear what without that knowledge would be neither clear nor unambiguous. Thus, in the case of a yearly tenant, a notice to quit on a named date, or on such other day as the tenancy shall expire next after the expiration of a year from the receipt of the notice, has been held good on the ground that the tenant must know or be assumed to know the date when the tenancy commenced ([1925] 1 K. B., at p. 20).

(*s*) *Muskett* v. *Hill*, 5 Bing. (N.C.) 694; *Ahearn* v. *Bellman*, 4 Ex. D. 201; 48 L. J. Ex. 681; 40 L. T. 711; *Freeman* v. *Evans*, [1922] 1 Ch., at p. 40; 91 L. J. Ch. 195; 125 L. T. 722.

increased rent (*t*), or states his intention of insisting upon double value if the tenant does not quit (*u*).

Notice to quit *part* of premises held on a single tenancy is invalid at Common Law (*x*). But by s. 140 of the *Law of Property Act*, 1925, it is provided that where the reversionary estate in any land comprised in a lease is severed (as *e.g.*, where a landlord sells in two lots to two different purchasers land that is let on a single tenancy), every condition or right of re-entry (including a right to determine the lease by notice to quit or otherwise) shall be apportioned and shall remain annexed to the severed parts of the reversionary estate: where, however, a notice to quit is served by a person entitled to a severed part of the reversion, so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter notice expiring at the same time as the original notice (*y*). And by s. 27 of the *Agricultural Holdings Act*, 1923 (replacing similar provisions of the earlier Acts) the landlord of a "holding" held by a tenant from year to year may, for the purpose of certain improvements therein specified, give notice to quit a part only of the holding, but the tenant is entitled to a reduction of rent and to compensation in respect of any depreciation of the value to him of the residue of the holding caused by the severance or by the use to be made of the part severed, and may within twenty-eight days accept the notice for the entire holding.

If, after the determination of a tenancy for years, and after a written demand for possession by the landlord (*z*), the tenant wilfully holds over, he is liable to pay double the yearly *value*

(*t*) *Ahearn* v. *Bellman* (*ubi supra*).

(*u*) *Doe* v. *Goldwin*, 2 Q. B. 143; 10 L. J. Q. B. 275; and see *Ahearn* v. *Bellman* (*ubi supra*). As to the landlord's right to double value, see *infra*. If, however, the notice offers the tenant a choice of alternatives, it is optional, *e.g.*, if it is in the form "You must give up possession or pay double rent"; and in such a case the fact that the tenant remains in possession is evidence of his agreement to pay double rent, entitling him to continue in possession (*Ahearn* v. *Bellman*, 4 Ex. D., at p. 214, explaining *Doe* v. *Jackson*, 1 Dougl. 175).

(*x*) See *Bebington* v. *Wildman*, [1921] 1 Ch. 559; 90 L. J. Ch. 269; 124 L. T. 661; 37 T. L. R. 409.

(*y*) As to agricultural holdings, see also s. 2 of the Law of Property (Amendment) Act, 1926.

(*z*) See *Page* v. *Moore*, 15 Q. B. 684.

of the land or premises (*a*). If after the tenant has given notice to quit, he does not deliver up possession at the proper time, he is liable to pay double the *rent* (*b*).

Waiver of a notice to quit is evidence of a new tenancy, and is constituted by any conduct indicating that the landlord treats the former tenant as still his tenant, notwithstanding the determination of the term by a valid notice to quit (*c*). Thus the demand and acceptance of rent for a period subsequent to the determination of the tenancy usually amounts to a waiver (*d*). And a waiver may be presumed from the giving of a new notice for a date later than the first, though this presumption is capable of rebuttal (*e*).

Forfeiture may arise:—

1. By *disclaimer*, *i.e.*, by the tenant's repudiation of the relation of landlord and tenant, or his claim to hold possession upon a ground inconsistent with the existence of that relation (*f*), or by his delivering possession to a third person who claims by a title adverse to that of the landlord (*g*).

2. By breach of a *condition subsequent*. The estate of the tenant may be qualified by a condition that it shall be defeated upon the occurrence of a certain event; *e.g.*, in case of a lease of mines, if the lessee shall neglect to work them. In such a case the landlord, without any express stipulation to that effect, has a right of re-entry upon breach of the condition (*h*).

(*a*) Landlord and Tenant Act, 1730, s. 1.

(*b*) *Distress for Rent Act*, 1737, s. 18. For the double *rent* distraint may be made.

(*c*) *Tayleur* v. *Wildin*, L. R. 3 Ex. 303; 37 L. J. Ex. 173; 18 L. T. 655; *Freeman* v. *Evans and Fletcher & Co.*, [1922] 1 Ch. 36; 91 L. J. Ch. 195; 125 L. T. 722; *Phipps & Co.* v. *Rogers*, [1925] 1 K. B., at p. 29; 93 L. J. K. B. 1009; 132 L. T. 140. Strictly speaking, a notice cannot be waived, and the expression simply means that the parties have come to a new agreement (*Davies* v. *Bristow*, [1920] 3 K. B., at p. 440; 89 L. J. K. B. 802; 123 L. T. 655; 36 T. L. R. 753).

(*d*) *Keith Prowse & Co.* v. *National Telephone Co.*, [1894] 2 Ch. 147; 63 L. J. Ch. 373; 70 L. T. 276; *Hartell* v. *Blackler*, [1920] 2 K. B. 261; 89 L. J. K. B. 838; 123 L. T. 171. The latter case is no longer an authority so far as the Rent Restriction Acts are concerned (*Shuter* v. *Hersh*, [1922] 1 K. B., at p. 450; 91 L. J. K. B. 263; 126 L. T. 346; 38 T. L. R. 127).

(*e*) *Doe* v. *Palmer*, 16 East, 53; *Doe* v. *Humphreys*, 2 East, 337.

(*f*) *Doe* v. *Skinner*, 1 M. & W., at p. 703; cited and approved in *Vivian* v. *Moat*, 16 Ch. D., at p. 733; 50 L. J. Ch. 331; 44 L. T. 210.

(*g*) *Doe* v. *Flynn*, 1 C. M. & R. 137; 3 L. J. Ex. 221.

(*h*) See *Doe* v. *Watt*, 8 B. & C. 308.

3. By breach of a *covenant by the lessee*. It is usual for both landlord and tenant to enter into various covenants—some of which will be dealt with later—and for a provision to be made that, on breach by the tenant of some or any of his covenants, the landlord shall have a right of re-entry. In such a case, upon breach of any covenant within the provision for re-entry the landlord has a right of re-entry; but upon breach of a covenant not within that provision he has merely the right to maintain an action for damages or for an injunction.

Re-entry for breach of covenant or condition.—A breach of a covenant or of a condition merely renders the tenancy *voidable* at the election of the landlord, and not absolutely void until the latter has by some "final and positive" act indicated his intention of determining it (*i*). Accordingly, if the landlord, with knowledge of the facts upon which his right to re-enter arises, by any subsequent unequivocal act evinces an intention to affirm the tenancy, as by acceptance of the rent with notice of the breach, he cannot afterwards insist upon the forfeiture (*k*).

Relief against forfeiture.—Equity had jurisdiction to relieve against forfeiture, but, following its general rule that relief would be given only against forfeiture for breach of a covenant to pay money, it would not, under ordinary circumstances, give relief to a tenant except in respect of non-payment of rent. Under special circumstances, however, it might give relief against forfeiture for other causes, as, *e.g.*, if the landlord had been guilty of fraud or other conduct which disentitled him from

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(*i*) *Doe* v. *Bancks*, 4 B. & Ald. 401; *Roberts* v. *Davey*, 4 B. & Ad. 664; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B., at p. 310; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510. Thus, the issue of a writ to recover possession is sufficient without any actual entry (*Id.*). A condition must be distinguished from a *conditional limitation*, *i.e.*, a grant *until* a certain contingency happens. In such a case there is nothing to carry the estate beyond the happening of the contingency, upon which it immediately becomes void (*Doe* v. *Clarke*, 8 East, 185, and for the difference between a condition and a conditional limitation, see *Re Machu*, 21 Ch. D. 838; 47 L. T. 577).

(*k*) *Croft* v. *Lumley*, 6 H. L. C. 672; 27 L. J. Q. B. 321; *Davies* v. *Bristow*, [1920] 3 K. B., at p. 438; 89 L. J. K. B. 802; 123 L. T. 655; 36 T. L. R. 753; *R.* v. *Paulson*, [1921] A. C. 271; 90 L. J. P. C. 1; 124 L. T. 449; *Fuller's Theatre Co.* v. *Rofe*, [1923] A. C., at p. 443; 92 L. J. P. C. 116; 128 L. T. 774; 39 T. L. R. 236. Conversely, the issue and service of a writ in ejectment is such a final election by the landlord to determine the tenancy that a subsequent receipt of rent is no waiver of the forfeiture (*Civil Service, etc., Society* v. *McGrigor's Trustee*, [1923] 2 Ch. 347; 92 L. J. Ch. 616; 129 L. T. 788).

insisting on his legal rights or if the breach had been due to some accident or mistake, not being the result of any negligence or misconduct on the part of the tenant (*l*).

Now, however, by s. 146 of the *Law of Property Act*, 1925 (replacing similar provisions of the Conveyancing Acts, 1881—1892) it is provided that " a right of re-entry or forfeiture under any proviso or stipulation in a lease (*m*), for a breach of any covenant or condition in the lease, shall not be enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach " (*n*). By the same section it is also provided that " where a lessor is *proceeding*," by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief "; and the Court may grant or refuse relief, as it thinks fit, having regard to the conduct of the parties and to the circumstances of the case and, if it grants relief, may do so upon such terms as it thinks fit with regard to costs, damages, compensation, or the grant of an injunction to restrain any like breach in the future (*o*).

(*l*) See *Barrow* v. *Isaacs*, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; *Fox* v. *Jolly*, [1916] 1 A. C., at p. 8; 84 L. J. K. B. 1927; 113 L. T. 1025; 31 T. L. R. 579. See also Wilshere's Equity, Chapter 5.

(*m*) The word " lease " includes an original or derivative underlease and an agreement for a lease where the lessee has become entitled to have his lease granted. The words " lessee " and " lessor " include, respectively, an original or derivative underlessee or underlessor, and the persons claiming under a lessee or lessor. The word " underlease " includes an agreement for an underlease when the underlessee has become entitled to have his underlease granted. The word " underlessee " includes any person deriving title under an underlessee (s. 146 (5)).

(*n*) S. 146 (1). The essentials of a valid notice are fully discussed in *Fox* v. *Jolly* (*ubi supra*), where the earlier authorities are reviewed. Where the breach is capable of remedy the notice need not demand compensation in money if none is in fact required or can be claimed by the lessor (*Lock* v. *Pearce*, [1893] 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 569).

(*o*) S. 146 (2). Note that this sub-section applies only when the landlord is " proceeding " to enforce his right, not where he has actually re-entered before the tenant has commenced proceedings for relief (*Rogers* v. *Rice*, [1892] 2 Ch.

The same section further provides that where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, *or for non-payment of rent*, the Court may, on application by any person claiming as *underlessee* any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to the execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court may think fit; but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease (*p*).

For the purposes of this section a lease limited to continue so long only as the lessee abstains from committing a breach of covenant shall take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such breach (*q*).

This section does not extend (i) to a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased when the breach occurred before 1926; (ii) in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or to inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof (*r*).

Nor does this section apply to a condition for forfeiture on the bankruptcy of the lessee, or on taking in execution of the lessee's interest if contained in a lease of (i) agricultural or pastoral land;

170; 61 L. J. Ch. 573; 66 L. T. 640). By s. 146 (3), a lessor is entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved under the provisions of the Act.

(*p*) S. 146 (4).
(*q*) S. 146 (7).
(*r*) S. 146 (8).

(ii) mines or minerals; (iii) a house used or intended to be used as a public-house or beer-shop; (iv) a house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; (v) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him (*s*).

Where, however, a condition of forfeiture, on the bankruptcy of the lessee or on the taking in execution of the lessee's interest, is contained in any lease, *other than* a lease of any of the classes mentioned in the last paragraph, then (i) if the lessee's interest is sold within one year from the bankruptcy or taking in execution, this section applies to such condition; (ii) if the lessee's interest is not sold before the expiration of that year, this section only applies to such condition during the first year from the date of the bankruptcy or taking in execution (*t*).

This section has effect notwithstanding any agreement to the contrary (*u*); but it does not, save as otherwise mentioned (*x*) affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent (*y*).

By s. 147 of the *Law of Property Act*, 1925, after a notice is served on a lessee relating to internal decorative repairs he may apply to the Court for relief, and if, having regard to the circumstances of the case (including, in particular, the length of the lessee's term or interest remaining unexpired), the Court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs. This section does not, however, apply (i) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair, and the covenant or agreement has never been performed; (ii) to any matter necessary for putting or keeping the property in a sanitary condition, or for the maintenance or preservation of the structure; (iii) to any statutory liability

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(*s*) S. 146 (9).
(*t*) S. 146 (10).
(*u*) S. 146 (12).
(*x*) See s. 146 (4).
(*y*) S. 146 (11). As to non-payment of rent, see *post*, p. 478.

to keep a house in all respects reasonably fit for human habitation; (iv) to any covenant or stipulation to yield up the property in a specified state of repair at the end of the term. The section applies notwithstanding any stipulation to the contrary (*z*).

Surrender may be—

1. *Express.*—By s. 3 of the *Statute of Frauds*, an express surrender of any lease (*a*) was required to be by deed, or note in writing signed by the surrenderor or his agent thereunto lawfully authorised in writing. And by s. 52 of the *Law of Property Act*, 1925, re-enacting s. 3 of the Real Property Act, 1845, a surrender in writing of a lease which could not be created without writing must be by deed.

2. By *operation of law*, which may take place—

(i) By the tenant accepting a new tenancy during the currency of his existing tenancy (*b*).

(ii) By the landlord accepting possession from the tenant with the intention of allowing the tenancy to be determined (*c*).

A lessee cannot, by voluntarily surrendering his lease, prejudice the right of his sub-lessee; the surrender destroys his own reversion on the underlease, but by s. 139 of the *Law of Property Act*, 1925 (replacing s. 9 of the Real Property Act, 1845), the estate of the head lessor is deemed to be the reversion on the underlease for the purpose of preserving the same incidents and obligations as would have affected the original reversion if there had been no underlease (*d*). And, by s. 150 of the *Law of Property Act*, 1925 (replacing s. 6 of the Landlord and Tenant Act, 1830), it is provided that where, with a view to the acceptance of a new lease, a lessee surrenders a lease out of which an underlease has been created, the position of the head lessor, lessee

(*z*) The term "lease" in this section includes an underlease and an agreement for a lease, and the term "lessee" has a corresponding meaning and includes any person liable to effect the repairs (*ibid.*).

(*a*) The statute applies even to leases which need not themselves be in writing (*Taylor* v. *Chapman*, Peake, Add. Ca. 19).

(*b*) *Lyon* v. *Reed*, 13 M. & W. 285; *Metcalfe* v. *Boyce*, [1927] 1 K. B. 758.

(*c*) *Phené* v. *Popplewell*, 12 C. B. (N.S.) 334; 31 L. J. C. P. 235; 6 L. T. 247; *Oastler* v. *Henderson*, 2 Q. B. D. 575; 46 L. J. Q. B. 607; 37 L. T. 22.

(*d*) *Mellor* v. *Watkins*, L. R. 9 Q. B. 400; *Parker* v. *Jones*, [1910] 2 K. B. 32; 79 L. J. K. B. 921; 102 L. T. 685; 26 T. L. R. 453; *Plummer* v. *David*, [1920] 1 K. B. 326; 89 L. J. K. B. 1021; 122 L. T. 493.

and underlessee shall, after the grant of the new lease, remain the same as if no surrender had taken place.

Merger takes place when the term and the immediate reversion become vested in the tenant in the same right (*e*).

Disclaimer.—If, during the continuance of a lease, the lessee becomes bankrupt, his trustee in bankruptcy may take the lease and hold it, or deal with it generally for the benefit of the creditors, or, if it is onerous property within s. 54 of the *Bankruptcy Act*, 1914, may, with the leave of the Court (*f*), disclaim it. Disclaimer determines as from its date the rights, interests and liabilities of the bankrupt and releases the trustee from all personal liability, but does not otherwise affect the rights and liabilities of any other person. The landlord, and any other person injured by the operation of the disclaimer, is deemed to be a creditor to the extent of the injury, and may prove the same as a debt under the bankruptcy.

Disclaimer must be made within twelve months from the trustee's appointment, unless the property shall not have come to the trustee's knowledge within one month after his appointment, when he may disclaim at any time within twelve months after he first became aware thereof; but if the landlord makes an application in writing to the trustee to decide whether or not he will disclaim, and the trustee does not then disclaim within twenty-eight days, or such further time as may be allowed by the Bankruptcy Court having jurisdiction, he cannot disclaim afterwards.

Principal Incidents of Tenancies.

Covenant for Quiet Enjoyment.—In the absence of any express stipulation, the law implies from the mere relationship of landlord and tenant a covenant on the part of the landlord for the quiet enjoyment by the tenant of the premises without interruption by the landlord or anyone claiming through him (*g*).

(*e*) See Williams' Real Property, p. 406.

(*f*) In some cases, however, the leave of the Court is not required (Bankruptcy Rules, 1915—1926, r. 276).

(*g*) *Markham* v. *Paget*, [1908] 1 Ch. 697; 77 L. J. Ch. 451; 98 L. T. 605, reviewing earlier authorities.

Repairs:—

1. *By landlord.*—Except by express agreement or statutory provisions, there is no warranty by a landlord, on a tenancy of land or an unfurnished house, that it is fit for occupation or for the purpose for which it is to be used (*h*); nor is any covenant implied on the part of the landlord that he will do repairs (*i*), nor is he liable to the tenant, or to the family, customers or guests of the tenant, for any loss or injury resulting from want of repair (*k*). And, in the absence of express agreement to the contrary, the tenant remains liable for rent even though the premises are destroyed by fire or other inevitable accident (*l*).

If a landlord covenants to repair, he is not liable for breach of covenant unless he has had notice of the want of repair (*m*). If, after notice, he fails to repair, the tenant, but not the tenant's family, can sue for any damages caused by the delay or want of repair (*n*), but he cannot do the repairs himself and set off the cost against his rent (*o*), or throw up the tenancy, unless the doing of the repairs was a *condition* of the existence of the tenancy (*p*).

(*h*) *Hart* v. *Windsor*, 12 M. & W. 68; 13 L. J. Ex. 129; *Sutton* v. *Temple*, 12 M. & W. 52; 13 L. J. Ex. 17; *Manchester Bonded Warehouses Co.* v. *Carr*, 5 C. P. D. 507; 49 L. J. C. P. 809; 43 L. T. 476; *Cockburn* v. *Smith*, [1924] 2 K. B., at p. 128; 93 L. J. K. B. 764; 131 L. T. 334; 40 T. L. R. 476; where however a landlord lets a number of flats or rooms in one building he is under an obligation to take reasonable care to prevent any portion of the premises which he keeps in his control from causing damage to the portions demised (*Cockburn* v. *Smith* (*ubi supra*), and see *post*, Part III., Chapter III.).

(*i*) *Gott* v. *Gandy*, 2 E. & B. 845; 23 L. J. Q. B. 1.

(*k*) *Lane* v. *Cox*, [1897] 1 Q. B., at p. 417; 66 L. J. Q. B. 193; 76 L. T. 135. But under the Public Health Acts a tenant who has been compelled to do repairs may in some cases recover the cost from the landlord: see, *e.g.*, *Gebhardt* v. *Saunders*, [1892] 2 Q. B. 452; 67 L. T. 684.

(*l*) *Manchester, etc., Co.* v. *Carr* (*ubi supra*); *Saner* v. *Bilton*, 7 Ch. D. 815; 47 L. J. Ch. 267; 38 L. T. 281.

(*m*) *Manchester, etc., Co.* v. *Carr* (*ubi supra*); and see *Hugall* v. *McLean*, 53 L. T. 94; *Morgan* v. *Liverpool Corporation*, 43 T. L. R. 146. But notice is not necessary where the landlord retains in his control the portion of the premises the condition of which is defective: *Melles & Co.* v. *Holme*, [1918] 2 K. B. 100; 87 L. J. K. B. 942; 119 L. T. 191. It has also been held that notice is not necessary where the lessor has *actual* knowledge of the want of repair (*Griffin* v. *Pillet*, [1926] 1 K. B. 17; 95 L. J. K. B. 67; 134 L. T. 58); nor (in a case to which the Housing and Town Planning Act, 1909, applied) in case of a latent defect which the tenant had not, and could not, by the exercise of reasonable diligence have discovered (*Fisher* v. *Walters*, [1926] 2 K. B. 315; 95 L. J. K. B. 846; 135 L. T. 411; 42 T. L. R. 499).

(*n*) *Id.*; and *Cavalier* v. *Pope*, [1906] A. C. 428; 75 L. J. K. B. 609; 95 L. T. 65; 22 T. L. R. 648.

(*o*) *Weigall* v. *Waters*, 6 T. R. 488.

(*p*) *Surplice* v. *Farnsworth*, 7 M. & Gr. 576; 13 L. J. C. P. 215.

Where, however, a *furnished house* is let for occupation, there is an implied *condition* that it is reasonably fit for occupation at the commencement of the tenancy, and if, through the presence of vermin, or defects in drains, or disease, it is not habitable, the tenant may not only recover damages but may throw up the tenancy (*q*).

By s. 1 of the *Housing Act*, 1925 (re-enacting similar provisions in earlier statutes) it is provided that in any contract for letting for habitation a dwelling-house or part of a dwelling-house at a rent not exceeding—

(a) £40, in the case of a house situate in the administrative county of London;

(b) £26, in the case of a house situate elsewhere;

there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord, during the tenancy, in all respects fit for human habitation. But this condition and undertaking shall not be implied where the letting is for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for habitation, and the lease is not determinable at the option of either party before the expiration of three years. The section applies to a contract made either before or after the commencement of the Act (July 1, 1925), provided that in the case of a house situate elsewhere than in the administrative county of London, or a borough or an urban district with a population of 50,000 or upwards, the rent whereof exceeds £15, the section shall not apply if the contract was made before July 31, 1923 (*r*).

(*q*) *Smith* v. *Marrable*, 11 M. & W. 5 (the "bug" case); *Wilson* v. *Finch-Hatton*, 2 Ex. D. 336; 46 L. J. Q. B. 489; 36 L. T. 473; *Sarson* v. *Roberts*, [1895] 2 Q. B. 375; 65 L. J. Q. B. 37; 73 L. T. 174 (where the condition was held to be implied on a letting of furnished apartments); *Collins* v. *Hopkins*, [1923] 2 K. B. 617; 92 L. J. K. B. 820; 39 T. L. R. 616 (breach of condition by the letting of a furnished house previously occupied by a person suffering from pulmonary consumption). But there is no implied warranty on the *taking* of furnished apartments that the intending *tenant* is free from infectious disease (*Humphreys* v. *Miller*, [1917] 2 K. B. 122; 86 L. J. K. B. 1111; 116 L. T. 688; 33 T. L. R. 115).

(*r*) The obligations under the Act are contractual, and only the tenant himself, and not his family, has any remedy for their breach (*Middleton* v.

By s. 2 of the Act, these provisions are extended to dwelling-houses occupied by workmen in agriculture, where the provision of a dwelling-house forms part of their remuneration, as if the word " employer " were substituted for " landlord " in the above sections.

By s. 3 of the Act, if the owner of any house suitable for occupation by the working classes fails to make and keep it reasonably fit for human habitation, the local authority may serve upon him a notice to do necessary repairs and, if the notice is not complied with, may do the work and recover the expenses from the owner who, if the house cannot with reconstruction be rendered reasonably fit for habitation, may serve a counter notice declaring his intention of closing the house for human habitation, and thereupon a closing order shall be deemed to have become operative in respect of the house.

2. *By tenant.*—In the absence of any express agreement by the tenant to do repairs he is not bound to do substantial repairs or to make good wear and tear, but only to keep the premises wind- and water-tight and to repair damage caused by his own acts (*s*). If the demised property is of an agricultural nature he is bound (subject to the Agricultural Holdings Act, 1923) to cultivate it in a husbandlike manner and according to the custom of the country (*t*).

The liability of a tenant for repairs is, however, usually governed by express agreement, and depends upon its terms. But the terms of a covenant to repair, either by a landlord (*u*) or a tenant, must be construed " as applied to the subject-matter." Thus, if a tenant covenants to " well and sufficiently repair " the premises and to yield them up at the end of the term " well and

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Hall, 108 L. T. 804; *Ryall* v. *Kidwell & Son*, [1914] 3 K. B. 135; 83 L. J. K. B. 1140; 111 L. T. 240; 30 T. L. R. 503).

(*s*) See *Ferguson* v. *Anon.*, 2 Esp. 590; *Horsfall* v. *Mather*, Holt, N. P. 7; *Anworth* v. *Johnson*, 5 C. & P. 239; *Torriano* v. *Young*, 6 C. & P. 8; *Leach* v. *Thomas*, 7 C. & P. 327; *Manchester, etc., Co.* v. *Carr* (*ubi supra*). He is not, however, liable for destruction caused by using the property in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used (*Manchester, etc., Co.* v. *Carr* (*ubi supra*)).

(*t*) *Wedd* v. *Porter*, [1916] 8 K. B., at p. 100; 85 L. J. K. B. 1298; 115 L. T. 243. See also the provisions of s. 10 of the Agricultural Holdings Act, 1923 (*post*, p. 481).

(*u*) *Torrens* v. *Walker*, [1906] 2 Ch. 166; 75 L. J. Ch. 645; 95 L. T. 409.

sufficiently repaired," his liability is to put the premises into the condition in which they would be found if they had been managed by a reasonably minded owner, having regard to the age and locality of the premises, the class of tenant likely to occupy them at the time of the demise, and the maintenance of the property in such a way that only an average amount of annual repair would be necessary in the future (*x*). But though these factors qualify the meaning of the covenant, they can never relieve the lessee from his obligation; if he undertakes to keep an old house in repair, he is bound to do it, whatever means are necessary to employ in so doing, even if it is so old that to keep it in good condition would require replacements of part after part until the whole was replaced (*y*). And, if a tenant covenants to *keep* premises in good repair, it is not sufficient for him to deliver up the premises in the same condition of repair as when he took them; he must deliver them up in good repair, even if they were not in good repair when the tenancy began (*z*). But if repair is impossible the tenant is not bound to reconstruct so as to give back at the end of the demise a totally different structure (*a*).

Where during the continuance of a lease an action is brought by a landlord for breach of a covenant to repair, "the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant" (*b*). If, however, the lease has expired, the measure of damages is the amount which it would cost to put the premises in the state of repair in which the tenant was bound to leave them (*c*).

(*x*) *Anstruther-Gough-Calthorpe* v. *McOscar*, [1924] 1 K. B. 716; 93 L. J. K. B. 273; 130 L. T. 691; 40 T. L. R. 223 (reviewing the authorities and distinguishing *Proudfoot* v. *Hart*, 25 Q. B. D. 42; 59 L. J. Q. B. 389; 63 L. T. 171). The obligation of the lessee is not lessened or increased because during the currency of the lease, the character of the tenants or the locality has deteriorated or improved (*Id.*).

(*y*) *Lurcott* v. *Wakely and Wheeler*, [1911] 1 K. B. 905; 80 L. J. K. B. 713; 104 L. T. 290.

(*z*) *Payne* v. *Haine*, 16 M. & W. 541; 16 L. J. Ex. 130; *Proudfoot* v. *Hart* (*ubi supra*).

(*a*) *Lister* v. *Lane*, [1893] 2 Q. B. 212; 62 L. J. Q. B. 583; 69 L. T. 176; *Lurcott* v. *Wakely and Wheeler* (*ubi supra*).

(*b*) *Conquest* v. *Ebbetts*, [1896] A. C., at p. 494; 65 L. J. Ch. 808.

(*c*) *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510; 65 L. T. 16. In this case, therefore, it is immaterial that under the terms of a new lease granted by the lessor he is no worse off than if the covenant had been performed (*Id.*).

Rates and Taxes.—The general rule is that the liability to pay rates and taxes falls upon the tenant in the absence of any contrary agreement. To this, however, there are certain exceptions, of which the following are the most important—

(i) *Property tax* is paid in the first instance by the tenant and deducted from the next payment of rent, any agreement to the contrary being void (*d*).

(ii) *Tithe rentcharge* issuing out of any land is payable by the owner of the lands, and any contract made after March 26, 1891, for payment by the tenant is void (*e*).

(iii) *Land tax* falls upon the landlord in the absence of any agreement to the contrary, the tenant paying it in the first instance and deducting out of the next payment of rent such proportion of the tax as the rent bears to the total annual value at which the premises are rated for land tax (*f*).

Usually, however, there is an express covenant by the tenant to pay not only rates and taxes, but also all assessments, charges and other outgoings, and, under such a covenant, the tenant is liable, not only for land tax, but also for many outgoings which are not strictly rates and taxes, such as charges for paving streets or for sanitary works (*g*).

(*d*) Income Tax Act, 1918, s. 211, sub-s. 2, re-enacting s. 14 of the Revenue Act, 1911. Where rent has been regularly paid without deduction, only one year's deduction can be made (*Hill* v. *Kirchenstein*, [1920] 3 K. B. 556; 89 L. J. K. B. 1128). But where rent has been allowed to fall in arrear for more than one year and the tenant has in the meantime paid the property tax, he can deduct the whole amount from the "next payment of rent" (*Kirk* v. *Cunnington*, [1921] 3 K. B. 637; 90 L. J. K. B. 1345; 125 L. T. 831; 37 T. L. R. 937). Where the tenant during the first year of his term undertakes to do repairs in lieu of paying rent, he cannot deduct the property tax from the rent payable for the second year or, in an action brought by the landlord for rent, counterclaim for the amount of the tax as money paid to the use of the landlord (*Drughorn* v. *Moore*, [1924] A. C. 53; 93 L. J. K. B. 161; 130 L. T. 321).

(*e*) Tithe Act, 1891, s. 1 (1); and see *Tuff* v. *Guild of Drapers of the City of London*, [1913] 1 K. B. 40; 82 L. J. K. B. 174; 107 L. T. 635. As to contracts made before that date, see s. 1 (2) of the Act.

(*f*) Land Tax Act, 1797, ss. 17 and 35. See also *Ward* v. *Const*, 10 B. & C. 635; *Amfield* v. *White*, R. & M. 246; *Manning* v. *Lunn*, 2 C. & K. 13.

(*g*) See *Greaves* v. *Whitmarsh*, [1906] 2 K. B. 346; 75 L. J. K. B. 633; 95 L. T. 425, in which reference is made to most of the earlier cases on this point.

Fixtures.—Whether or not a chattel has become a fixture is a question of law (*h*), depending upon the nature of the chattel itself, the purpose for which it was attached to the demised premises, and the extent and degree of the attachment (*i*). Thus in *Leigh* v. *Taylor* (*k*) valuable tapestries affixed to the walls of a house as decorations, and for the purpose of their enjoyment as such by the occupant of the house, were held not to have become fixtures (*l*).

Any article that had become a fixture was at Common Law considered as part of the freehold, the maxim being, *Quicquid plantatur solo, solo cedit.* This rule was, however, gradually relaxed, and it is now settled that articles which have been affixed to premises "for the purposes of trade or of domestic convenience or ornament and domestic use," or agriculture, may, subject to certain conditions, be removed by a tenant, although, in the strict sense of the term, they have become fixtures (*m*).

Where a tenant has a right to remove fixtures (other than agricultural fixtures), his right to do so exists only during the existence of his tenancy, or during some period after its termination in which he may be considered to be still in possession

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(*h*) *Reynolds* v. *Ashby & Son*, [1904] A. C., at p. 471; 73 L. J. K. B. 946; 91 L. T. 607; 20 T. L. R. 766.

(*i*) [1904] A. C., at p. 472; *Leigh* v. *Taylor*, [1902] A. C. 157; 71 L. J. Ch. 272; 86 L. T. 239; 18 T. L. R. 293; *Vaudeville Electric Cinema* v. *Muriset*, [1923] 2 Ch. 74; 92 L. J. Ch. 558; 129 L. T. 466. Where an article is no further attached to the land than by its own weight it generally remains a mere chattel, but even in such a case it may be a fixture if there was an apparent intention to make it part of the land as, *e.g.*, blocks of stone placed one on top of another without any mortar for the purpose of making a dry wall (*Holland* v. *Hodgson*, L. R. 7 C. P. 328; 41 L. J. C. P. 426; 26 L. T. 709).

(*k*) *Ubi supra.*

(*l*) Compare *Re Whaley*, [1908] 1 Ch. 615; 77 L. J. Ch. 367; 98 L. T. 556, where tapestry affixed to a room, not for its enjoyment as a chattel but as part of a general scheme of decoration, was held to have become a fixture.

(*m*) See *Climie* v. *Wood*, L. R. 4 Ex., at p. 329; 38 L. J. Ex. 223; 20 L. T. 1012; *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B., at p. 90; 77 L. J. K. B. 199; 97 L. T. 850; 24 T. L. R. 35; *Re British Red Ash Collieries, Ltd.*, [1920] 1 Ch. 326; *Pole-Carew* v. *Western Counties, etc., Co.*, [1920] 2 Ch. 97; 89 L. J. Ch. 559; 123 L. T. 12; 36 T. L. R. 322 (in which a large number of earlier cases is cited). But the term "fixture" is limited to chattels, and does not include "something *permanently* annexed to the freehold of the nature of a building" ([1920] 2 Ch., at p. 117), or machinery so annexed to a building for the purpose of its completion and use as a factory (*Reynolds* v. *Ashby & Son, ubi supra*); it applies, moreover, only to things affixed after the structure of the premises is complete and not to things forming part of the original structure (*Boswell* v. *Crucible Steel Co.*, [1925] 1 K. B. 119; 94 L. J. K. B. 383; 132 L. T. 274).

of the premises as tenant (*n*): afterwards he can remove them only by consent of his landlord (*o*). The right to remove fixtures may also be controlled by an express contract to deliver up at the end of the tenancy all "improvements" (*p*), or "fixtures" (*q*), or "erections" (*r*).

The removal of *agricultural fixtures* is now governed by statute. By s. 3 of the *Landlord and Tenant Act*, 1851, it was provided that all buildings, engines, or machinery erected by the tenant of a farm after the passing of the Act, *with the consent of the landlord*, "either for agricultural purposes or for the purposes of trade and agriculture," and not having been so erected in pursuance of some obligation on that behalf, shall remain the property of the tenant and be removable by him, although the same may consist of separate buildings, or be permanently fixed to the soil, so as the tenant, however, in making such removal, do not permanently injure the land or buildings of the landlord, but the tenant, before removal, must give one month's notice in writing to the landlord, who has the option of purchase at a price to be fixed by arbitration.

By s. 22 of the *Agricultural Holdings Act*, 1923, it is further provided that when, after 1883, a tenant affixes (*s*) to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not (under that Act or otherwise) entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf, or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and removable by the tenant before or within a reasonable time after the termination of the tenancy (*t*). Provided, however, as follows:—(i) Be-

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(*n*) *Pugh* v. *Arton*, L. R. 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865; *Ex p. Stephens*, 7 Ch. D. 127; 47 L. J. Bk. 22; 37 L. T. 613.

(*o*) But such consent will give him no rights against a new tenant who is in possession: *ante*, p. 443, note (*f*), and see *Thomas* v. *Jennings*, 66 L. J. Q. B. 5; 75 L. T. 274.

(*p*) *Penny* v. *Brown*, 2 Stark. 403; *West* v. *Blakeway*, 2 Man. & G. 729; 10 L. J. C. P. 173.

(*q*) *Leschallas* v. *Woolf*, [1908] 1 Ch. 641; 77 L. J. Ch. 345; 98 L. T. 558.

(*r*) *Pole-Carew* v. *Western, etc., Co., Ltd.* (*ubi supra*); and see *Re British, etc., Collieries* (*ubi supra*).

(*s*) The provisions of the section apply also to fixtures and buildings acquired after 1900 by a tenant from a previous tenant (s. 22 (2)).

(*t*) Note that under this Act the fixture need not have been erected with the landlord's consent.

fore the removal of any fixture or building the tenant shall pay all rent owing by him, and shall perform or satisfy all his other obligations to the landlord in respect of the holding. (ii) In the removal of any fixture or building the tenant shall not do any avoidable damage to any other building or other part of the holding. (iii) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding. (iv) The tenant shall not remove any fixture or building without giving one month's previous *notice in writing* to the landlord of his intention to remove it. (v) At any time before the expiration of the notice of removal the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding (*u*).

Rent and the Landlord's Remedies for its Recovery.—Rent payable by a tenant of corporeal hereditaments to his landlord is *rent service*, and usually consists in a money payment, which takes the place of the services which every tenant formerly had to render to his lord as incident to the tenure of his estate (*x*): it can, therefore, be reserved only to the lessor himself, and, after his death, to the reversioner (*y*).

Rent must be *certain*, that is to say, the amount must either be fixed or it must be a mere matter of arithmetical calculation (*z*). In formal leases rent is reserved in the *reddendum*, but there is usually also an express covenant by the lessee to pay the rent so reserved, and a provision giving the lessor a right of re-entry on non-payment. If no rent has been fixed the landlord

(*u*) The parties to a tenancy may contract out of the provisions of this section (*Premier Dairies* v. *Garlick*, [1921] 1 Ch. 17, a decision upon a corresponding provision in the Agricultural Holdings Act, 1908).

(*x*) Rent may, however, still be payable in kind (*e.g.*, in wheat), or by personal services (Co. Litt. 142 a.; *Doe* v. *Benham*, 7 Q. B., at p. 982).

(*y*) Rent cannot issue out of chattels personal, but where rent is payable in respect of a furnished house, it is deemed to issue only out of the realty, so that the whole may be distrained for (*Newman* v. *Anderton*, 2 N. R. 224).

(*z*) *Selby* v. *Greaves*, L. R. 3 C. P. 594; 37 L. J. C. P. 251; 19 L. T. 186; *Walsh* v. *Lonsdale*, 21 Ch. D. 9; 52 L. J. Ch. 2; 37 L. T. 379 (rent of a mill at 30s. *per annum* for each loom run by the lessee).

may maintain an action for use and occupation (*a*). Rent is not payable until midnight of the day appointed for its payment, and, at Common Law, it was not apportionable, so that if a tenancy was, by forfeiture or otherwise, prematurely determined during a quarter, no rent could be recovered for that broken quarter (*b*). Now, however, by the *Apportionment Act*, 1870, it is provided that "all rents . . . shall . . . be considered as accruing from day to day, and shall be apportionable in respect of time accordingly," and that "the apportioned part of any such rent . . . shall be payable or recoverable in the case of a continuing rent . . . when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent . . . determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined and not before."

For the recovery of rent the landlord, in addition to a right of action, has also the rights of distress, and, if there is a provision to that effect, of re-entry.

Distress.—Distress for arrears of rent service is a Common Law incident of the tenure of corporeal hereditaments. At Common Law, however, the things seized could be held only as a security for payment of the rent; the right to sell them in satisfaction of the rent was first given by the Distress Act, 1689 (*c*).

Conditions.—It follows from what has been already said that, in the absence of express agreement to the contrary (*d*), the following conditions must be satisfied before distraint can be made:—

(i) The relationship of landlord and tenant must have been created either expressly, by a lease or agreement for a lease; or impliedly, by payment of rent or admission of a tenancy (*e*). And the relationship must exist at the time of the distraint, so that where a landlord, upon a forfeiture having been incurred,

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(*a*) See Bullen & Leake's Pleadings (3rd ed.), p. 196.
(*b*) *Grinman* v. *Legge*, 8 B. & C. 234.
(*c*) *Post*, p. 473.
(*d*) See *Chapman* v. *Beecham*, 3 Q. B., at p. 324; *Pollitt* v. *Forrest*, 11 Q. B., at p. 961.
(*e*) *Ante*, pp. 446, 447.

[*This Table is taken, by permission of the*

I.—Things absolutely privileged:—

(A) At Common Law—

(1) Fixtures: Co. Litt. 47 b.; 3 Black. Comm. 10; *Darby* v. *Harris*, 1 Q. B. 895; *Crossley Brothers, Ltd.* v. *Lee*, [1908] 1 K. B. 86; *Provincial Bill Posting Co.* v. *Low Moor Iron Co.*, [1909] 2 K. B. 344.

(2) Things which cannot be restored in as good plight as when taken: Co. Litt. 46 b.; 2 Black. Comm. 9; *Morley* v. *Pincombe*, 2 Ex. 101.

(3) Animals *feræ naturæ*: Co. Litt. 47 a.; 3 Black. Comm. 7, 8.

(4) Things in actual use: Co. Litt. 47 a.; 3 Black. Comm. 8; *Simpson* v. *Hartopp*, Willes, 512, 516, 517.

(5) Things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade: Co. Litt. 47 a.; 3 Black. Comm. 8; *Simpson* v. *Hartopp*, Willes, 512, 514, 515; *Gilman* v. *Elton*, 3 Brod. & B. 75; cf. *Clarke* v. *Millwall Dock Co.*, 17 Q. B. D. 498; *Challoner* v. *Robinson*, [1908] 1 Ch. 49.

(6) Things in the custody of the law: Co. Litt. 47 a.; *Peacock* v. *Purvis*, 2 Brod. & B. 362; *Wharton* v. *Naylor*, 12 Q. B. 673; *Re Mackenzie*, [1899] 2 Q. B. 566, 573, 574.

(7) Things belonging to the Crown: *Secretary of State for War* v. *Wynne*, [1905] 2 K. B. 845.

(8) Money, if not in a sealed bag or other closed receptacle, which can be identified: Bac. Abr. Distress (B), ii. 697, 7th ed.

(9) Beasts that stray on to the land through the default of the tenant or landlord thereof (as by not maintaining proper fences), until they have been *levant* and *couchant* on the land: Co. Litt. 47 b. and n. (2) (3); 3 Black. Comm. 8, 9; *Jones* v. *Powell*, 5 B. & C. 647.

(B) By statute—

(10) The goods of an ambassador: 7 Anne, c. 12, s. 3.

(11) Machines, materials, tools or apparatus used in the textile manufactures as specified in the Hosiery Act, 1843, and not belonging to the tenant: 6 & 7 Vict. c. 40, ss. 18, 19, 34, 35.

(12) Gas meters and fittings, water pipes, meters and apparatus, and electric light meters, fittings and apparatus not belonging to the tenant, but supplied by the gas, water or electric lighting company or other statutory "undertakers," subject to the provisions of the Gasworks Clauses Acts, 1847 or 1871, the Waterworks Clauses Acts, 1847 or 1863, or the Electric Lighting Acts, 1882 or 1909: stats. 10 & 11 Vict. c. 15, s. 14; 34 & 35 Vict. c. 41, s. 18; 10 & 11 Vict. c. 17, s. 44; 26 & 27 Vict. c. 93, s. 14; 45 & 46 Vict. c. 56, s. 25; 9 Edw. 7, c. 34, s. 16.

(13) Railway rolling stock not belonging to the tenant as provided in the Railway Rolling Stock Protection Act, 1872: 35 & 36 Vict. c. 50, s. 3.

(14) The wearing apparel and bedding of the tenant and his family and the tools and implements of his trade to the value (in all) of £5: Law of Distress Amendment Act, 1888, s. 4: County Courts Act, 1888, s. 147; *Davis* v. *Harris*, [1900] 1 Q. B. (*n*).

(15) On holdings subject to the Agricultural Holdings Act, 1923, agricultural or other machinery not belonging to the tenant and being on the holding under an agreement with him for the hire or use thereof in the conduct of his business, and live stock not belonging to the tenant and being on the holding solely for breeding purposes: *Id.* s. 35 (4).

(16) Subject to observance of the conditions specified in the Law of Distress Amendment Act, 1908 (ss. 1, 4, 5), as to serving on the landlord a declaration of ownership and otherwise, the goods of—

(a) any undertenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any

(*n*) If the only article on the premises is worth £5 it cannot therefore be seized (*Lavell* v. *Ritchings*, [1906] 1 K. B. 480). Compare *Boyd* v. *Bilham*, [1909] 1 K. B. 14.

whole year the full annual value of the premises or of such part thereof as is comprised in the undertenancy;

(b) any lodger;

(c) any other person whatsoever not being a tenant of the premises or of any part thereof and not having any beneficial interest in any tenancy of the premises or any part thereof.

But this Act does not apply to—

(i) goods belonging to the husband or wife of the tenant whose rent is in arrear, or

(ii) goods comprised in any bill of sale, hire-purchase agreement or settlement made by such tenant: see *Rogers* v. *Martin*, [1911] 1 K. B. 19 (deciding that goods comprised in a hire-purchase agreement made by the tenant's wife are protected); *Hackney Furnishing Co.* v. *Watts*, [1912] 3 K. B. 225; *Jay's Furnishing Co.* v. *Brand*, [1915] 1 K. B. 459 (deciding that goods are "comprised" in a hire-purchase agreement although the owner has given notice determining the agreement).

(iii) goods in the possession, order or disposition of such tenant by the consent and permission of the true owner under such circumstances that such tenant is the reputed owner thereof, or

(iv) any live stock to which s. 35 of the Agricultural Holdings Act, 1923, applies, or

(v) goods of a partner of the immediate tenant, or

(vi) goods (not being goods of a lodger) upon premises where any trade or business is carried on in which both the immediate tenant and the undertenant have an interest, or

(vii) goods (not being goods of a lodger) on premises used as offices or warehouses where the owner of the goods neglects for one calendar month after notice to remove the goods and vacate the premises, or

(viii) goods belonging to and in the offices of any company or corporation on premises the immediate tenant whereof is a director or officer, or in the employment of such company or corporation, or

(ix) any undertenant where the undertenancy has been created in breach of any covenant or agreement in writing between the landlord and his immediate tenant, or where the undertenancy has been created under a lease existing at the date of the passing of the Act contrary to the wish of the landlord in that behalf, expressed in writing and delivered at the premises within a reasonable time after the circumstances have come, or with due diligence would have come, to his knowledge.

II.—Things privileged conditionally only, if there be no other sufficient distress on the premises:—

(A) At Common Law—

(1) Tools and instruments of a man's trade or profession and implements of husbandry, though not in actual use: Co. Litt. 47 a.; *Simpson* v. *Hartopp*, Willes, 512, 515; 3 Black. Comm. 9; *Gorton* v. *Falkner*, 4 T. R. 565; *Gonsky* v. *Durrell*, [1918] 2 K. B. 71.

(2) Beasts of the plough and sheep; see authorities last cited; *Piggott* v. *Birtles*, 1 M. & W. 441, 452.

(B) By statute—

(3) On holdings subject to the Agricultural Holdings Act, 1923, live stock belonging to another person and taken in by the tenant to be fed at a fair price: *Id.*, s. 35 (1).

At Common Law growing crops and sheaves or cocks of corn were not distrainable: Co. Litt. 47 a.; 3 Black. Comm. 10. But sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with the rent were made distrainable by s. 2 of the Distress Act, 1689. And all sorts of corn and grass, hops, roots, fruit, pulse or other product growing on any part of the land demised were made distrainable by ss. 8, 9 of the Distress for Rent Act, 1737: see *Clark* v. *Gaskarth*, 8 Taunt. 431; *Piggott* v. *Birtles*, 1 M. & W. 441.

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elects to determine the lease, he cannot subsequently distrain for rent accruing after he has commenced proceedings for ejectment (*f*).

(ii) The reversion must be in the distrainor (*g*).

(iii) The rent must be certain (*h*).

(iv) The rent must be in arrear (*i*). Where, however, rent is payable in advance, it is in arrear directly the period for which it is payable commences (*k*). Rent may lawfully be made payable on a Sunday (*l*).

On what goods.—The general rule at Common Law is that a landlord is entitled to distrain upon all goods upon the demised premises, whether they are the property of the tenant or a stranger (*m*); this rule, however, is subject to many exceptions, a Table of which is annexed.

The exception as to lodgers and undertenants should be particularly noticed. The goods of a stranger were never liable to be taken in execution, but in case of distress they might be seized. Hence distraint might be made upon the goods of a lodger until they were protected by the Lodgers' Goods Protection Act, 1871, which is itself now replaced by the wider provisions of the *Law of Distress Amendment Act*, 1908. By s. 1 of this Act, which came into operation on July 1, 1909, if a superior landlord(*o*) distrains any furniture, goods, or chattels of—

(1) any undertenant liable to pay by equal instalments not less often than every actual or customary quarter of a year a rent which would return in any whole year the full annual value of the premises comprised in his undertenancy, or,

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(*f*) *Bridges* v. *Smyth*, 5 Bing. 410.

(*g*) *Stavely* v. *Allcock*, 16 Q. B. 636.

(*h*) *Ante*, p. 467.

(*i*) *Ante*, p. 468.

(*k*) *Ex p. Hale*, 1 Ch. D. 285; 45 L. J. Bk. 21; 33 L. T. 706. If, however, it is provided that the rent shall be payable in advance only if so required by the landlord, a demand for payment is necessary before distraint can be made (*London, etc., Loan Co.* v. *London and North Western Ry. Co.*, [1893] 2 Q. B. 49; 62 L. J. Q. B. 370; 69 L. T. 320).

(*l*) *Child* v. *Edwards*, [1909] 2 K. B. 753; 78 L. J. K. B. 1061; 101 L. T. 422; 25 T. L. R. 706.

(*m*) *Challoner* v. *Robinson*, [1908] 1 Ch. 58; 77 L. J. Ch. 72; 98 L. T. 222; 24 T. L. R. 38.

(*o*) "Superior landlord" includes a landlord if the goods seized are not those of an undertenant or lodger: s. 9.

(2) any lodger (*p*), or

(3) any other person whomsoever who is not a tenant of the premises or any part thereof and has no beneficial interest in any tenancy of the premises or of any part thereof,

for arrears of rent due to the distraining landlord by his immediate tenant, such undertenant, lodger, or other person aforesaid, may serve the distraining landlord or his bailiff with a written declaration (*q*) (to which must be annexed a correct signed inventory of the goods) that the immediate tenant has no property or beneficial interest in the goods, and that the same are the property or in the lawful possession of such undertenant, lodger, or other person aforesaid, and are not gools or live stock to which the Act is expressed not to apply, and also (in the case of an undertenant or lodger) the amount of any rent due from him to his immediate landlord and the times at which future instalments will become due and their amount, and undertaking to pay the superior landlord all rent so due or to become due to his immediate landlord until the arrears distrained for are paid off. If the landlord, or his bailiff or employee, proceeds with the distress after service of the declaration and inventory and (in the case of an undertenant or lodger) payment or tender of any rent then due from him, he is to be guilty of an illegal distress, and can be sued at law for damages; and the undertenant or lodger or such other person as aforesaid may apply to a stipendiary magistrate, or two justices of the peace, who shall make such order for recovery of the goods or otherwise as seems just after enquiry into the truth of the declaration and inventory (*r*).

(*p*) The Act does not define *lodger*, but does say that the word "tenant" or "undertenant" does not include a lodger: s. 9.

(*q*) This need not be a statutory declaration, and may be made for a firm by one partner signing his own name: *Rogers* v. *Martin*, [1911] 1 K. B. 19; 80 L. J. K. B. 208; 103 L. T. 527; 27 T. L. R. 40. As to the sufficiency of this declaration, see *Thwaites* v. *Wilding* (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; 32 W. R. 80; 49 L. T. 396; *Ex p. Harris* (1885), 16 Q. B. D. 130; 55 L. J. M. C. 24. As to signature of the inventory, see *Godlonton* v. *Fulham, etc., Property Co., Ltd.*, [1905] 1 K. B. 431; 74 L. J. K. B. 242. A knowingly untrue statement in the signed declaration and inventory is a misdemeanour; Perjury Act, 1911, s. 5.

(*r*) Law of Distress Amendment Act, 1908, s. 2. The bailiff, as well as the

The Act also provides (*s*) that where the rent of the immediate tenant of the superior landlord is in arrear, such landlord may serve upon any undertenant or lodger a notice (by registered post addressed to such undertenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring all future payments of rent, whether already due or not, to be made direct to him by the undertenant or lodger until such arrears have been paid, and that such notice shall operate to transfer to the superior landlord the right to recover, receive and give a discharge for such rent. For the purposes of the recovery of any sums payable by an undertenant or lodger, either under the undertaking given in pursuance of s. 2 of the Act or under a notice served in accordance with s. 6, the undertenant or lodger is deemed to be the immediate tenant of the superior landlord and the sum payable is deemed to be rent and may, when paid, be deducted by the undertenant or lodger from the rent due to his immediate landlord (*t*).

When made.—At Common Law a landlord can distrain only during the continuance of the tenancy, and only upon goods actually upon the premises. But by ss. 6 and 7 of the *Landlord and Tenant Act*, 1709, a landlord, if his title still continues *and the tenant is still in possession* can distrain for rent after the determination of the lease, provided that he makes the distress within six calendar months after its determination. And, by ss. 1—3 of the *Distress for Rent Act*, 1737, if a tenant, after rent has become due, "fraudulently *or* clandestinely" removes his goods from the premises in order to prevent the landlord from distraining, the landlord may within thirty days follow and distrain upon the goods, wherever they may be, unless in the meantime they have been sold *bona fide* and for valuable consideration to a purchaser without notice: the landlord may also recover a penalty of twice the value of the goods from the tenant or any other person who knowingly assists him. Under the provisions of this Act, the landlord can follow and distrain upon the goods only when, if the goods had not been removed, he might have distrained upon them either under the Common Law or under the Landlord and

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landlord can be sued for an illegal distress (*Lowe* v. *Dorling*, [1906] 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243).

(*s*) S. 6. (*t*) S. 3.

Tenant Act, 1709; he cannot do so if the tenancy has come to an end and the tenant is no longer in possession (*u*).

By s. 26 (4) of the *Administration of Estates Act*, 1925 (replacing similar provisions of the Civil Procedure Act, 1833), a personal representative may distrain in like manner as the deceased might have done had he been living, and may distrain after the termination of the lease or tenancy, provided that the distress is made (i) within six months after its termination; (ii) during the continuance of the possession of the lessee or tenant from whom the arrears of rent were due.

How made.—Distress can be made only by a landlord in person or by a bailiff holding a certificate under the *Law of Distress Amendment Act*, 1888 (*x*). It must be made between sunrise and sunset (*y*). It must be made by legal *entry* upon the premises; the landlord or bailiff may not, therefore, break open the outer door of the house or any other building (*z*), or open a window that is closed, even though it is not fastened (*a*); but he may make use of any of the usual means of entry, as by lifting the latch of a closed door and he may enter through an *open* window, even though it has to be opened wider in order to gain admission (*b*). But when entry has been lawfully obtained an inner door may be broken open.

If, however, the distrainer, after having properly entered, is ejected by the tenant (*c*), or, having left the premises, is refused re-admission, he may use force to re-enter, provided, in either case, that there was no abandonment of the distress (*d*). And by s. 7 of the *Distress for Rent Act*, 1737, where goods have been

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(*u*) *Gray* v. *Stait*, 11 Q. B. D. 668; 52 L. J. Q. B. 412; 49 L. T. 288.

(*x*) *Id.*, s. 7. See *Perring & Co.* v. *Emerson*, [1906] 1 K. B. 1; 75 L. J. K. B. 12; 93 L. T. 748.

(*y*) *Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J. Ex. 271; 2 L. T. 261.

(*z*) *Long* v. *Clarke*, [1894] 1 Q. B. 119; 63 L. J. Q. B. 108; 69 L. T. 654. The only limitation on the landlord's right is that he must not *break in*; subject to this restriction he may do that which, if done by other persons, would be a trespass: his entry is not, therefore, unlawful because, in order to effect it, he gets over the wall of a yard (*Ibid.*). A *sheriff* may, for the purpose of executing a writ of *fieri facias*, break open the outer door of a building of the judgment debtor, not being his dwelling-house or connected therewith (*Hodder* v. *Williams*, [1895] 3 Q. B. 63; 65 L. J. Q. B. 70; 73 L. T. 394).

(*a*) *Nash* v. *Lucas*, L. R. 2 Q. B. 590; 16 L. T. 610.

(*b*) *Crabtree* v. *Robinson*, 15 Q. B. D. 312; 54 L. J. Q. B. 444.

(*c*) *Eldridge* v. *Stacey*, 15 C. B. (N.S.) 458.

(*d*) *Bannister* v. *Hyde*, 2 E. & E. 627.

fraudulently or clandestinely removed, he may, in the presence of a constable, break open any house or building in which they are suspected to be concealed, provided that he has first made oath before a justice of the peace of a reasonable ground for believing the goods to be therein (*d*).

After entry, *seizure* of the goods is necessary, though it may be constructive, as, *e.g.*, by an expression of intention to prevent the removal of goods from the premises (*e*). After seizure, an inventory of the goods is made, a copy of which, with a written notice of the distress and its cause, must be left on the premises (*f*). The next step is to *impound* the goods, so placing them in the custody of the law. Formerly impounding could take place only by depositing the goods in a proper pound, but now by s. 10 of the *Distress for Rent Act*, 1737, they may be impounded upon the premises (*g*), in which case the impounding is complete as soon as notice of distress with an inventory of the goods has been delivered, and it is not necessary that the landlord or his bailiff should remain in possession (*h*).

The *right to sell* distrained goods was first given by s. 2 of the *Distress Act*, 1689, which provided that if the tenant failed to replevy (*i*) the goods within five days after the notice of distress, the "person distraining shall and may . . . cause the goods and chattels so distrained to be appraised by two . . . appraisers . . . and after such appraisement shall and may lawfully sell the goods and chattels so distrained for the best price that can be gotten for the same, towards satisfaction of the rent." By s. 6 of the *Law of Distress Amendment Act*, 1888, the period during which the tenant may replevy is extended to fifteen days,

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(*d*) *Bannister* v. *Hyde*, 2 E. & E. 627.

(*e*) *Wood* v. *Nutt*, 5 Bing. 10; *Cramer & Co., Ltd.* v. *Mott*, L. R. 5 Q. B. 357; 39 L. J. Q. B. 172; 22 L. T. 857.

(*f*) Distress Act, 1689, s. 1. See *Kerby* v. *Harding*, 6 Ex. 234; 20 L. J. Exch. 163. Want of proper notice does not render the distress invalid, though it makes a sale of the goods irregular (*Trent* v. *Hunt*, 9 Ex. 14).

(*g*) By s. 8 of this Act and s. 3 of the Distress Act, 1689, impounding on the premises is compulsory in the case of corn, grain, hay, and growing crops made distrainable by those sections (see Table facing p. 469) unless, in the case of growing crops, there is no convenient barn upon the premises.

(*h*) *Swann* v. *Falmouth (Earl) and Jennings*, 8 B. & C. 456; *Tennant* v. *Field*, 8 E. & B. 336; *Johnson* v. *Upham*, 2 E. & E. 250; *Jones* v. *Biernstein*, [1900] 1 Q. B. 100; 69 L. J. Q. B. 1; 81 L. T. 533.

(*i*) Replevin will be dealt with in Part III., Chap. I.

provided that the tenant or owner of the goods makes a written request to the landlord to that effect, and gives security for any additional costs thereby occasioned. And by s. 5 of the same Act, an appraisement of the goods is no longer necessary, unless the tenant or owner of the goods by writing requires it, and for the purposes of sale the goods shall at the request in writing of the tenant, be removed to a public auction room or some other fit and proper place specified in such request and be there sold, the costs of the removal being borne by the person making the request (*k*).

For what amount.—A landlord may ordinarily distrain for six years' arrears of rent (*l*) except in the case of holdings within the Agricultural Holdings Act, 1923, when he can distrain only for one year's rent before the making of the distress; but, in the latter case, if the ordinary custom between the landlord and tenant has been to defer payment of rent until a quarter or half year after it was due, the rent, for the purposes of distress, is deemed to have become due at the expiration of that quarter or half year, and not at the date when it legally became due (*m*).

If a landlord distrains before the goods are taken in *execution*, he has a right to be satisfied in full, notwithstanding the subsequent execution. If the goods have been seized in execution, no distraint is possible, as the goods are *in custodia legis*, but, by the *Landlord and Tenant Act*, 1709, the landlord on giving notice to the sheriff that rent is due, has a right to be paid any arrears, not exceeding one year's rent, before the goods are removed under the execution; and the sheriff is empowered to levy out of the goods and pay the execution creditor, not only the execution money, but also the amount of the rent paid by him to the landlord (*n*).

(*k*) A purchase by the landlord himself, even at auction, is invalid and passes no property to him, whether the goods belong to a third person (*Moore, Nettlefold & Co.* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820; 73 L. J. K. B. 457; 90 L. T. 469; 20 T. L. R. 366) or to the tenant (*Plasycoed Collieries Co.* v. *Partridge, Jones & Co.*, [1912] 2 K. B. 345; 81 L. J. K. B. 723; 106 L. T. 426).

(*l*) See *ante*, p. 190.

(*m*) Agricultural Holdings Act, 1923, s. 5.

(*n*) *Landlord and Tenant Act*, 1709, s. 1. If the premises are let at a weekly rent, the landlord's claim is limited to four weeks' arrears, and if let under any other periodic tenancy, less than a yearly tenancy, for arrears for four of the periods or times of payment (*Execution Act*, 1844, s. 67). Where

If the tenant becomes *bankrupt* the landlord may, by s. 35 (1) of the *Bankruptcy Act*, 1914, distrain at any time, either before or after the commencement of the bankruptcy, but, if the distress is levied after the commencement of the bankruptcy, it is available only for six months' rent accrued prior to the order of adjudication; the landlord may, however, prove in the bankruptcy for any surplus for which the distress may not have been available. The Act also provides that where the goods have been taken in execution, the preferential claim of the landlord under s. 1 of the Landord and Tenant Act, 1709, or under s. 160 of the County Courts Act, 1888, shall only extend to six months' rent, unless notice of the claim was served on the sheriff before the commencement of the bankruptcy (*o*).

It is also provided by s. 209 of the *Companies (Consolidation) Act*, 1908, and s. 33 of the *Bankruptcy Act*, 1914 (as amended by s. 26 of the *Unemployment Insurance Act*, 1920, and s. 7 (3) of the *Workmen's Compensation Act*, 1925), that if a landlord distrains on the goods of a person who dies insolvent or of a bankrupt or of a company within three months before the death or the date of the receiving order, or winding-up order, certain debts shall be a first charge on the goods so distrained or the proceeds thereof, but, in respect of any money paid under any such charge, the landlord shall have the same rights of priority as the person to whom such payment is made. These preferred debts are—

(i) All parochial and other local rates due at the date of the receiving order, or of the commencement of the winding-up, or (when a company which had not previously commenced to be wound up voluntarily is ordered to be wound up compulsorily) at the date of the winding-up order, and payable within the preceding twelve months, and all assessed taxes, land tax, property or income tax assessed up to the preceding April 5, but not exceeding on the whole one year's assessment.

(ii) Wages of a clerk or servant for the four months previous to such date not exceeding £50.

(iii) Wages of a labourer or workman for the two months

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the goods have been seized under a *County Court execution*, the rights of the landlord are regulated by s. 160 of the *County Courts Act*, 1888.

(*o*) *Id.*, s. 35 (2).

previous to such date, not exceeding £25; where, however, an agricultural labourer has entered into a contract for the payment of a portion of his wages in a lump sum, at the end of the year of hiring his priority extends to the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service he has completed up to such date.

(iv) [*Except in the case of a company which is being wound up voluntarily for the purpose of reconstruction or amalgamation with another company*]. Any amount due in respect of any compensation or liability for compensation under the Workmen's Compensation Act, 1925, which has accrued before the date of the receiving order or of the commencement of the winding-up of the company.

(v) [*Subject to the same exception.*] All contributions payable under the Unemployment Insurance Act, 1920, in respect of employed persons during the four months before the date of the receiving order or of the commencement of the winding-up, or of the winding-up order.

All those debts rank equally between themselves and are paid in full unless the property of the bankrupt or company is insufficient to meet them, in which case they abate in equal proportions.

How lost.—The right of distress may be barred (i) by agreement (*p*) or estoppel (*q*); (ii) by payment or tender of the rent or by the recovery of judgment (*r*) for the rent; (iii) by acceptance by the landlord of something in satisfaction of the rent (*s*); (iv) by a previous distress upon the same goods for the same rent.

Tender may be made either to the landlord or to the bailiff (*t*). If made before entry tender of the exact rent is sufficient, even

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(*p*) *Giles* v. *Spencer*, 3 C. B. (N.S.) 244; 26 L. J. C. P. 237.

(*q*) *Miles* v. *Furber*, L. R. 8 Q. B. 77; 42 L. J. Q. B. 41; 27 L. T. 756; *Papè* v. *Westacott*, [1891] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18.

(*r*) *Potter* v. *Bradley & Co.*, 10 T. L. R. 445. But it would not be barred by judgment upon a collateral security (see *Wegg-Prosser* v. *Evans*, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1; 72 L. T. 8).

(*s*) *Ante*, pp. 169, 175.

(*t*) *Hatch* v. *Hale*, 15 Q. B. 10; 19 L. J. Q. B. 289. As to the requirements of a valid tender, see *ante*, p. 179.

though a distress warrant has been delivered to the bailiff (*u*); if made after entry the costs of the distress must be added (*x*). In the first case, distress after the tender is illegal; in the second case, detention of the goods after the tender is illegal (*y*). Tender after impounding is too late to make either the distress or the detention of the goods illegal, but, if made within the time allowed for replevying the goods, it makes their subsequent sale by the landlord illegal (*z*).

The acceptance by the landlord of a bill of exchange or promissory note bars his right of distraint only if it is accepted in satisfaction of the rent. But even though it is not accepted in actual satisfaction of the rent, its acceptance is evidence from which a jury may infer an agreement by the landlord to suspend his remedy during its currency (*a*).

A second distress for the same rent is generally illegal (*b*), though the landlord may, after the goods have been sold, bring an action for any rent that remains unsatisfied (*c*). But a second distress for the same rent is valid if the first was void (*d*), or if the landlord on the first occasion made a mistake as to the value of the goods, thinking them to be sufficient and afterwards discovering his error (*e*); or if distress has been abandoned through some act on the part of the tenant, *e.g.*, if it is withdrawn on false representations by him (*f*), or under some arrangement which he fails to carry out (*g*), or if by the wrongful act of the tenant the landlord has been prevented from realising the fruits of the distress (*h*).

A *wrongful distress* of any kind is a tort, and as such will be dealt with later.

(*u*) *Bennett* v. *Bayes*, 5 H. & N. 391; 29 L. J. Ex. 224; 2 L. T. 156.
(*x*) *Vertue* v. *Beasley*, 1 Moo. & R. 21.
(*y*) *Holland* v. *Bird*, 10 Bing., at p. 18.
(*z*) *Johnson* v. *Upham*, 2 E. & E. 250; 28 L. J. Q. B. 252.
(*a*) *Palmer* v. *Bramley*, [1895] 2 Q. B. 405; 65 L. J. Q. B. 42; 73 L. T. 329.
(*b*) *Hutchins* v. *Chambers*, 1 Burr. 579; see *Owens* v. *Wynne*, 4 E. & B., at p. 584.
(*c*) *Lehain* v. *Philpott*, L. R. 10 Ex. 242; 44 L. J. Ex. 225; 33 L. T. 98.
(*d*) *Grunnell* v. *Welch*, [1906] 2 K. B. 555; 74 L. J. K. B. 925; 93 L. T. 269; 22 T. L. R. 688.
(*e*) *Hutchins* v. *Chambers* (*ubi supra*); *Bagge* v. *Mawby*, 8 Ex., at p. 649; 22 L. J. Ex. 236.
(*f*) *Woolaston* v. *Stafford*, 15 C. B. 278.
(*g*) *Thwaites* v. *Wilding*, 12 Q. B. D. 4; 53 L. J. Q. B. 1; 49 L. T. 396.
(*h*) *Lee* v. *Cooke*, 3 H. & N. 203; 27 L. J. Ex. 337.

Re-entry for Non-payment of Rent.—The right of a landlord to re-enter for non-payment arises only out of an express provision to that effect in the lease or tenancy agreement. At Common Law, in order to take advantage of such a provision, the landlord was bound to make a formal demand (i) at the place, if any, specified for payment of the rent, or, if no place was specified, upon the land itself; (ii) of the exact rent due; (iii) at a convenient time before sunset of the day when it was due, the demand being continued until sunset. This rule was, however, usually nullified by an express provision giving the landlord a right of re-entry for non-payment of rent, "whether legally demanded or not."

By s. 212 of the *Common Law Procedure Act*, 1852, it was provided that *if half a year's rent is in arrear* and the landlord has a right to re-enter for the non-payment thereof, he may without formal demand or re-entry serve a writ for the recovery of the demised premises and if, at the trial, it is proved that half a year's rent was in arrear, and that the landlord had power to re-enter, *and that no sufficient distress was to be found on the demised premises*, the landlord shall recover judgment and execution in the same manner as if the rent had been legally demanded and a re-entry made. But all proceedings must be stayed if the tenant, at any time before trial, tenders to the landlord or pays into Court all the arrears, together with the costs. The Act also provided that relief *in Equity* should be obtainable only within six months after execution, and only upon payment of all arrears of rent and the costs of the action.

Relief against forfeiture for non-payment of rent.—In an action of ejectment for forfeiture for non-payment of rent, the Courts of Common Law would restrain proceedings where the defendant paid the rent and costs into Court pending the action. After judgment and execution they had no jurisdiction to give relief to the tenant, but the Courts of Equity would, in such a case, order a new lease to be executed if the tenant brought into Court the arrears of rent and the costs (*i*).

But, by s. 1 of the *Common Law Procedure Act*, 1860, power

(*i*) *Hare* v. *Elms*, [1893] 1 Q. B., at p. 607; 62 L. J. Q. B. 187; 68 L. T. 223.

was given to the Court of Common Law to grant relief in *any* action of ejectment, even after execution, subject, however, to the conditions laid down by the Common Law Procedure Act, 1852, *i.e.*, that it can be granted only within six months after execution and only on payment by the tenant of arrears and costs. The Act also provides that, upon relief being granted, the premises shall continue to be held under the old lease, without the grant of any new lease being necessary.

Compensation.—An *agricultural* tenant now has many statutory rights to compensation which, at Common Law, he could possess only by custom or express agreement.

By the *Agricultural Holdings Act*, 1923, the tenant of a "holding" is, subject to the conditions therein specified, entitled to compensation for improvements, for increase in the value of the holding due to a special system of farming, for damage done by game, and for unreasonable disturbance. The provisions of the Act are complicated and can only be outlined.

Improvements.—By s. 1 of the Act, where a tenant of a holding has made thereon any improvement comprised in the First Schedule to the Act [and, if the contract of tenancy was made after 1920, whether or not it was an improvement which, by the terms of his tenancy he was required to make] he is entitled, at the termination of his tenancy, on quitting his holding, to obtain from the landlord as compensation such sum as fairly represents the value of the improvement to an incoming tenant (*k*).

The First Schedule is in three parts. Part I. includes permanent improvements such as alteration of buildings and making watercourses. In respect of these no compensation under the Act is payable unless, before the execution of the improvement, the landlord has given *written consent* to its making; such consent may be given unconditionally or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, in which case any compensation payable

(*k*) But, by s. 8 of the Act, restrictions are imposed on the right of a tenant to recover compensation for improvements (other than manuring) made by him when about to quit.

under the agreement will be substituted for the compensation payable under the Act (*l*).

Part II. of the Schedule comprises only drainage. In respect of this no compensation under the Act is payable unless the tenant, before beginning to execute the improvement, has given the landlord *written notice* in accordance with the provisions of the Act. Upon such notice being given the landlord and tenant may agree on the terms as to compensation or otherwise on which the improvement is to be executed, in which case, any compensation payable under the agreement will be substituted for the compensation payable under the Act; in default of such agreement the landlord may, unless the tenant withdraws his notice, execute the improvement himself and recover the expenditure from the tenant in the manner prescribed by the Act; if the landlord fails to execute the improvement within a reasonable time, the tenant may then do so and will be entitled to compensation under the Act. The landlord and tenant may, however, by the contract of tenancy or otherwise, agree to dispense with any notice under this section and may, by the same agreement, provide for anything for which an agreement after notice under this section may provide (*m*).

Part III. of the Schedule comprises minor improvements such as the chalking, claying, liming, etc., and manuring of land and [subject to certain conditions] the laying down of temporary pasture, and also repairs to buildings necessary for the proper cultivation or working of the holding. It also includes, in the case of a holding which by agreement in writing is let or treated as a market garden, certain improvements specified in the Third Schedule to the Act (*n*). For improvements within this part of the Schedule neither the consent of nor notice to the landlord is necessary except in the case of repairs, which must not be executed unless the tenant has given the notice prescribed by the Act, and the landlord fails to execute them within a reasonable time (*o*).

(*l*) S. 2. (*m*) S. 3.

(*n*) S. 48.

(*o*) First Schedule, Part III. By s. 4 of the Act it is provided that where any agreement made *before* 1921 secures to the tenant reasonable compensation for any improvement under this Part, such compensation shall be substituted for compensation under the Act.

Where an incoming tenant has, with the consent in writing of the landlord, paid to an outgoing tenant any compensation payable under the Act in respect of any improvement, he is entitled, on quitting the holding, to claim compensation in respect of that improvement in the same manner as the outgoing tenant would have been entitled to claim if he had remained in possession of the holding until that time (*p*).

Compensation in respect of increased or diminished value of holding.—By s. 9 of the Act it is provided that, subject to specified conditions, where the value of the holding to an incoming tenant has been increased during the tenancy by the continuous adoption of a standard or system of farming which has been more beneficial to the holding than the standard or system required by the contract of tenancy, the tenant shall, on quitting the holding, be entitled to such compensation as represents the value to an incoming tenant of the adoption of that standard or system. Conversely, s. 10 of the Act gives a corresponding right of compensation to the landlord on the termination of the tenancy if the value of the holding has been deteriorated during the tenancy by the failure of the tenant to cultivate the holding according to the rules of good husbandry or the terms of the contract of tenancy (*q*). *Notice in writing* of intent to claim compensation under either of these sections must be given before the termination of the tenancy.

Compensation for damage by game.—When the tenant of a holding has sustained damage to his crops from game the right to kill and take which is vested neither in him nor in any one claiming under him other than the landlord, and which the tenant has not permission in writing to kill, he is entitled, subject to certain specified conditions, to compensation from his landlord for such damage if it exceeds the amount of one shilling per acre of the area over which the damage extends. The tenant must give to the landlord *notice in writing of the damage* as soon as possible after he has observed it, and a reasonable opportunity to

(*p*) S. 6.

(*q*) But, by s. 30 of the Act, a tenant (other than a tenant who is about to quit) is given full right to practise any system of cropping arable land notwithstanding any custom or any term of the contract of tenancy, subject, however, to a liability to compensate the landlord if he exercises his right so as to deteriorate the holding.

inspect the damage before the crop is reaped, raised, consumed, or begun to be removed, and must also give *notice in writing of the claim* within the time specified by the Act (*r*).

Compensation for disturbance.—By s. 12, it is provided that where the tenancy of a holding is terminated by reason of a notice to quit given by the *landlord*, and in consequence of such notice the tenant quits the holding, then, unless the notice to quit is given *and states that it is given* for one or more of six reasons specified in the section (*s*), compensation shall be payable by the landlord to the tenant, unless the landlord has made an offer in writing to withdraw the notice to quit, and the tenant has unreasonably refused or failed to accept the offer.

Where the tenancy is terminated in consequence of notice to quit given by the *tenant*, no compensation is payable unless such notice is given, *and stated to be given*, because the landlord has

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(*r*) S. 11. For the purposes of this section "game" means deer, pheasants, partridges, grouse, and black game. By ss. 6—8 of the Game Act, 1831, the right to kill and take game belongs to the tenant unless expressly reserved to the landlord, who, where it is so reserved to him, may authorise any other person or persons having a game licence to enter upon the land for pursuing and killing game (*id.*, s. 11; and as to licences, see the *Game Licences Act*, 1860). The subject of *ground game* is further governed by the *Ground Game Acts* of 1880 and 1906. By the first Act every occupier of land has, as inseparable from his occupation, the right to kill and take *ground game* thereon concurrently with any other person who may be entitled to do so. The right may be exercised by himself or by persons duly authorised by him in writing; but only the occupier himself and one other authorised person may kill ground game with firearms, and no person may be authorised by the occupier to kill or take ground game, except members of his household resident on the land, persons in his ordinary service on the land, and one other person *bona fide* employed by him for reward for that purpose (s. 1). Every agreement which purports to divest this right of the occupier is void (s. 2; see *Sherrard* v. *Gascoigne*, [1900] 2 Q. B. 279; 69 L. J. Q. B. 720; 82 L. T. 850).

(*s*) These reasons are (a) that the tenant at the date of the notice was not cultivating according to the rules of good husbandry; (b) that, at the date of the notice, he had failed to comply within a reasonable time with a notice requiring him to pay any rent due or to remedy any breach (capable of being remedied) of any condition of the tenancy consistent with good husbandry; (c) that, at the date of the notice, he had materially prejudiced the interests of the landlord by committing such a breach which was not capable of being remedied; (d) that, at the date of the notice, he had become bankrupt or compounded with his creditors; (e) that, on or after January 1, 1921, he has refused, or within a reasonable time failed, to agree to a written demand by the landlord for arbitration under the Act as to the rent to be paid as from the next date at which the tenancy could have been determined by notice to quit given by the landlord at the date of the demand; (f) that, at the date of the notice, he had unreasonably refused, or within a reasonable time failed, to comply with a written demand by the landlord to execute, at the expense of the landlord, an agreement setting out the existing terms of the tenancy.

refused or failed within a reasonable time to agree to a demand in writing made by the tenant for arbitration under the Act, as to the rent to be paid as from the next ensuing date at which the tenancy could be determined by notice to quit given by the tenant; and, even in this case, no compensation is payable if the circumstances are such that notice to quit could have been given by the landlord for any of the reasons mentioned in the preceding paragraph (*t*).

The compensation payable under this section is a sum representing such loss or expense directly attributable to the quitting of the holding, as the tenant may unavoidably incur upon or in connection with the sale or removal of his household goods, implements, fixtures, produce or stock, together with any expenses reasonably incurred in the preparation of his claim for compensation (not being costs of an arbitration to determine the amount of compensation); such sum, however, is to be computed at an amount equal to one year's rent of the holding, unless it is proved that the loss and expenses so incurred exceed this amount, in which case, the sum recoverable will be such as represents the whole loss and expenses incurred up to a maximum amount equal to two years' rent (*u*).

No compensation is, however, payable under this section unless the tenant has, not less than one month before the termination of the tenancy, given *notice in writing* to the landlord of his intention to claim such compensation, or, if the tenant has died within three months before the date of the notice to quit; nor is any compensation payable in respect of the sale of any goods, implements, fixtures, produce or stock, unless the tenant has, before the sale, given the landlord a reasonable opportunity of making a valuation thereof (*x*).

Compensation payable under this section is in addition to any compensation payable in respect of improvements (*y*).

The expression "holding" in this section does not include any

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(*t*) S. 12 (3).

(*u*) But to entitle the tenant to the minimum compensation of one year's rent he must prove that he has suffered some actual loss or expense of the kind indicated by the section (*Minister of Agriculture and Fisheries* v. *Dean*, [1924] 1 K. B. 851; 93 L. J. K. B. 374; 130 L. T. 709; 40 T. L. R. 285).

(*x*) S. 12 (7). Various other restrictions upon the right to compensation are also imposed by this sub-section.

(*y*) S. 12 (10).

land which forms part of any park, garden, or pleasure ground attached to and usually occupied with the mansion-house, or any land adjoining the mansion-house which is required for its *protection or amenity*. Such land is governed by s. 13 of the Act which provides that, if the landlord without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit, the tenant upon quitting the land shall, in addition to compensation for improvements, be entitled to compensation for the loss or expense directly attributable to his quitting the land, and unavoidably incurred upon or in connection with the sale or removal of his household goods, implements, produce or stock.

No compensation is payable under this section where the tenant has died within three months before the date of the notice to quit, nor unless the tenant has given the landlord a reasonable opportunity of valuing the goods, implements, produce and stock, nor unless the tenant has, within two months after receiving notice to quit, given notice in writing of his intention to claim such compensation, and has made his claim within three months after quitting the land.

By s. 14 of the Act the provisions of the two preceding sections are, subject to certain modifications, made applicable to cottages forming part of a holding and in the occupation of workmen employed in agriculture on the holding.

By s. 33 of the Act it is provided that where the land comprised in a tenancy is not a "holding" within the Act by reason only of the fact that it includes "non-statutory land," *i.e.*, land which, owing to the nature of the buildings thereon, or the use to which it is put, would not, if separately let, be a "holding" within the Act, the provisions of the Act relating to compensation for *improvements and disturbance* shall, unless otherwise agreed in writing, apply to the part of land exclusive of the "non-statutory" land as if that part were a separate holding.

Except in so far as the Act allows agreements to be made for compensation in substitution for compensation under the Act, any contract made by a tenant of a holding by virtue of which his right to claim compensation is taken away or limited, is void (*z*).

(*z*) S. 50. The excepted cases are in ss. and 3 (*ante*, pp. 479, 480), and in s. 49 (6), which relates to market gardens.

By various sections in the Act it is provided that the amount of any compensation recoverable by the tenant or landlord is to be settled by arbitration (*a*), and by s. 16 it is provided that any question or difference arising out of any claim by the tenant against the landlord for compensation payable under the Act, or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste, or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant arising out of the termination of the tenancy or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy, and any other question which, under the Act is referred to arbitration, shall be determined, notwithstanding any agreement providing for a different method of arbitration, by a single arbitrator in accordance with the provisions of the Second Schedule to the Act (*b*). Any claim, however, in respect of such question or difference ceases to be enforceable after the expiration of two months from the termination of the tenancy [or, where the tenant lawfully remains in occupation of part of the holding and the claim relates to that part of the holding], from the termination of the occupation, unless, in the meantime, particulars of such claim have been given by the landlord to the tenant or *vice versa* (*c*).

In any arbitration under the Act the arbitrator may, at any stage of the proceedings, and must, if so directed by the Judge of the County Court upon the application of either party, state in the form of a special case for the opinion of that Court, any question of law arising in the course of the arbitration (*d*); the opinion of the County Court is final unless either party appeals to the Court of Appeal, from whose decision no appeal lies (*e*). The provisions of the Arbitration Act, 1889, do not apply to arbitrations under this Act (*f*).

(*a*) See c. 9, ss. 5, 9, 10, 11.

(*b*) But by s. 36 disputes as to distress may be determined by the County Court or a Court of summary jurisdiction. And by s. 30 (2) a landlord may obtain an injunction and damages for cultivation deteriorating the holding.

(*c*) S. 16 (2).

(*d*) Schedule II, rule 10.

(*e*) S. 16 (4).

(*f*) S. 16 (5).

But, by s. 54 of the Act, it is provided that, except as in the Act expressed, nothing in the Act shall prejudicially affect any power, right or remedy of a landlord in respect of a contract of tenancy. Accordingly, in spite of the very wide language of s. 16, which could be made to cover almost any dispute between landlord and tenant, arbitration is compulsory only with regard to rights established by the Act and not previously existing, and s. 16 does not affect any Common Law or statutory rights of the landlord or tenant which relate to subject-matter outside the provisions of the Act, and which existed before and independently of the Act (*g*), as, for instance, the right of the landlord to bring an action of ejectment against a tenant under an expired notice to quit, who alleges that the notice to quit has been waived (*h*).

In the case of *small holdings and allotments* the rights of a tenant to compensation are extended by s. 47 of the *Small Holdings and Allotments Act*, 1908, and by ss. 2—6 of the *Allotments Act*, 1922.

Sub-lessees and Assignees.

Where a lessee of property grants a sub-lease there is neither privity of contract nor privity of estate between the head-lessor and the sub-lessee. Accordingly, the sub-lessee cannot enforce against the head-lessor any covenants by him in the head-lease, nor, conversely, can the head-lessor enforce against the sub-lessee any covenants by the lessee in the head-lease (*i*).

Where, however, a lessee *assigns* his lease, privity of estate is created between the assignee and the head-lessor or the assigns of

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(*g*) *I.e.*, the present Act and the earlier Acts which it replaces.

(*h*) *Lowther* v. *Clifford*, [1927] 1 K. B. 130. Moreover, s. 16 is probably limited to procedure, and provides merely that any arbitration which has to take place shall be regulated by the special provisions of the Second Schedule (*id.*).

(*i*) The head-lessor may, nevertheless (subject to certain conditions which are outside the scope of this work) under the rule in *Tulk* v. *Moxhay*, 2 Ph. 774), restrain the sub-lessee from the breach of a negative covenant entered into by the lessee restricting the use of the land (see *John Brothers* v. *Holmes*, [1900] 1 Ch. 188; 60 L. J. Ch. 149; 81 L. T. 771). This right, however, depends merely upon the fact that the sub-lessee is in occupation of the land and can be exercised against a person who is in occupation without having any interest in or title to the land (*Mander* v. *Falcke*, [1891] 2 Ch. 554; 65 L. T. 203; *Re Nisbet and Pott's Contract*, [1906] 1 Ch. 386; 75 L. J. Ch. 238; 94 L. T. 297; 22 T. L. R. 234).

the reversion. Accordingly, *in the case of covenants running with the land*—

1. The benefit of such covenants made by the lessor and the burden of such covenants made by the lessee run at Common Law with the land demised (*k*):
2. The benefit of such covenants made by the lessee, and the burden of such covenants made by the lessor, run by statute with the reversion (*l*).

In order that a covenant can run with the land it must be a covenant which "touches and concerns" the land, that is to say, a covenant which affects the nature, quality or value of the land or the mode of using and enjoying it, and not merely a collateral covenant for the personal benefit of the covenantee (*m*). Thus a covenant by a lessor to do something on land other than the land demised (*n*), or a covenant giving a lessee an option to purchase the land demised (*o*), is a personal and collateral covenant; but a covenant for quiet enjoyment (*p*), and a covenant to pay rent (*q*) or to repair (*r*), and a covenant to leave the land as well stocked with game (*s*) as at the time of the demise, and all implied covenants (*t*) are covenants running with the land. At Common Law a covenant relating to something not in existence could not run with the land unless the covenantor expressly covenanted for himself and his assigns, but by s. 79 of the *Law of Property Act*, 1925, the assigns of the reversion are bound unless a contrary intention is expressed.

(*k*) *Spencer's Case*, 1 Sm. L. C. 55.

(*l*) Law of Property Act, 1925, ss. 141, 142 (replacing ss. 10 and 11 of the Conveyancing Act, 1881, and s. 3 of the Conveyancing Act, 1911).

(*m*) *Horsey Estate, Ltd.* v. *Steiger*, [1899] 2 Q. B., at p. 89; 68 L. J. Q. B. 743; 80 L. T. 857; 15 T. L. R. 367; *Dyson* v. *Forster*, [1909] A. C., at p. 102; 78 L. J. K. B. 246; 99 L. T. 942; 25 T. L. R. 166.

(*n*) *Thomas* v. *Hayward*, L. R. 4 Ex. 311; 38 L. J. Ex. 175; 20 L. T. 814; *Dewar* v. *Goodman*, [1909] A. C. 72; 78 L. J. K. B. 209; 100 L. T. 2; 25 T. L. R. 137.

(*o*) *Woodall* v. *Clifton*, [1905] 2 Ch. 257; 74 L. J. Ch. 555; 93 L. T. 257.

(*p*) *Manchester, etc., Ry. Co.* v. *Anderson*, [1898] 2 Ch. 394; 67 L. J. Ch. 568; 78 L. T. 821; 14 T. L. R. 489; *Booth* v. *Thomas*, [1926] Ch., at p. 409; 95 L. J. Ch. 160; 134 L. T. 464; 42 T. L. R. 496.

(*q*) *Stevenson* v. *Lambard*, 2 East, 575; *Williams* v. *Bosanquet*, 1 Brod. & Bing. 238.

(*r*) *Stevenson* v. *Lambard* (*ubi supra*); *Martyn* v. *Clue*, 18 Q. B. 661; 22 L. J. Q. B. 147.

(*s*) *Hooper* v. *Clark*, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79.

(*t*) *Wedd* v. *Porter*, [1916] 2 K. B. 91; 85 L. J. K. B. 1298; 115 L. T. 243.

But the express covenants entered into by the lessor with the lessee, or by the lessee with the lessor, are unaffected by any assignment, and remain binding upon them during the whole term (*u*). Accordingly, the assignee was at Common Law bound to indemnify the lessee against breaches of the covenants in the lease committed during the continuance of his tenancy (*x*). And now, by s. 77 of the Law of Property Act, 1925, there is, in all assignments made after 1925, an implied covenant by the assignee, that he will *at all times* pay all rent becoming due under the lease, and perform and observe all the covenants in the lease, and keep the assignor indemnified against any omission to pay the rent and any breach of covenant.

(*u*) *Baynton* v. *Morgan*, 22 Q. B. D., at p. 82; 54 L. J. Q. B. 139; 59 L. T 478; *Stuart* v. *Joy*, [1904] 1 K. B. 362; 73 L. J. K. B. 97; 90 L. T. 78; 20 T. L. R. 109.

(*x*) *Moule* v. *Garrett*, L. R. 7 Ex. 101; 41 L. J. Ex. 62; 26 L. T. 367.

PART III.

TORTS.

INTRODUCTION.

SECTION 1.—LIABILITY IN TORT AND REMEDIES FOR TORTS.

The Different Kinds of Torts.—In the law of contract we have been considering only one class of rights—namely, those which arise from agreement, and which, in each case, depend upon the nature and terms of the particular agreement. In the law of torts we have to deal with several different classes of rights which have been created by law and depend upon general rules of law.

The word "tort," in its literal sense, simply means a "wrong" of any kind, and at one time was so used; in its modern sense, however, it denotes all violations of private rights, other than those arising *ex contractu*, which, before the Judicature Act, 1873, would support one of the actions for damages then recognised by the Common Law Courts.

The history of these actions is outside the scope of this book. They originated at different times and in different ways, the majority of them being actions on the case, framed either upon trespass or upon other actions which became obsolete (*a*). The law which they created was characterised by extreme formality, so that a plaintiff who had a good cause of action might nevertheless fail if he chose the wrong form of action. Forms of action are now abolished, but in order to determine if a plaintiff has a good cause of action it is generally necessary to know the conditions requisite for the maintenance of the old

(*a*) See Jenks' Short History of English Law, Chapters X. and XVII.

Common Law actions. The Statute of Westminster (*b*), however, still remains in force, so that an action of case will lie for a new instance of wrong which is *consimili casu* with any wrong already recognised and defined by law. "Where the case is only new in the instance and the only question is upon the application of a principle recognised in the law to such new case, it will be just as competent to Courts of justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago" (*c*).

Tort Founded on Contract.—The distinction between tort and contract, which is of importance for many purposes (*d*), is one of substance and not of form (*e*). There were, however, even under the old system of pleading, certain cases in which a plaintiff might treat his cause of action either as a breach of contract or a tort. In such cases the wrong was said to be a "tort founded on contract" because, though it was a breach of a duty imposed by law, that duty existed only as a result of a contractual relationship between the parties. Now, however, it is settled that an action is founded on contract only when the plaintiff must prove the existence of a contract (*f*), and a breach of some particular stipulation in that contract (*g*), "but where it is only necessary to refer to the contract to establish a relationship between the parties and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort" (*h*). Thus an action brought by a railway passenger against the company for damages for personal injuries caused by the negligence of the company's servants is an action of tort, not

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(*b*) *Ante*, p. 6.

(*c*) *Pasley* v. *Freeman* (1789), 3 T. R. 51. For an example, see *Wilkinson* v. *Downton*, *post*, p. 495.

(*d*) *E.g.*, as regards the costs of an action in the High Court, which could have been commenced in the County Court (County Courts Act, 1919, s. 11), and the transfer of actions from the High Court to the County Court (*id.*, ss. 1 and 2). Other distinctions will be noted later.

(*e*) *Taylor* v. *Manchester, etc., Railway*, [1895] 1 Q. B., at pp. 139, 140; 71 L. T. 596.

(*f*) *Ibid.*; *Turner* v. *Stallibrass*, [1898] 1 Q. B., at p. 59; 67 L. J. Q. B. 52; 77 L. T. 482.

(*g*) *Edwards* v. *Mallan*, [1908] 1 K. B., at p. 1005; 77 L. J. K. B. 608; 98 L. T. 824; 24 T. L. R. 376.

(*h*) *Sachs* v. *Henderson*, [1902] 1 K. B., at p. 617; 71 L. J. K. B. 392; 86 L. T. 437; 18 T. L. R. 382.

of contract; for it is an action that can be maintained by anyone lawfully upon the premises of the company. "The fact that the plaintiff happens to have a contract, that is to say, a ticket, is of use in such an action, it is true, for the purpose of showing that the plaintiff was lawfully where he was when he sustained the injury; but proof of the fact can be given *aliunde*, and proof of a contract is by no means vital to success" (*i*). So, also, an action against a dentist for unskilfully extracting a tooth is an action of tort, though his duty to use proper skill arises out of the contractual relationship between himself and his patient (*k*). Again, in cases of bailment, a duty not to be negligent in respect of the article bailed is imposed upon the bailee by the Common Law, independently of any contract. If, therefore, a plaintiff complains merely of a breach of that Common Law duty, his action is one of tort; "but, if his cause of action is that the defendant ought to have done something, or taken some precaution, which would not be embraced by the Common Law liability arising out of the relation of bailor and bailee," then the action is one of contract (*l*).

A defendant may be liable to an action of tort at the suit of B, although his breach of duty arose out of a contract with A. Thus, if a husband or father engages a surgeon for his wife or child, an action for damages caused by negligent or unskilful treatment may be brought by the wife or child, because a duty to take care arises from the relation of surgeon and patient, although there is no privity of contract between them (*m*). So, also, where the servant of A took a ticket for a journey on the defendants' railway, and handed to the defendants' servants as his personal luggage a portmanteau containing the property of A, it was held that A could sue for damages caused to his property by the negligence of the defendants' servants: the right of A was independent of contract and would have existed though there had been no contract with the servant; the portmanteau having been accepted by the defendants' servants for the purposes of carriage,

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(*i*) *Taylor* v. *Manchester, etc., Railway* (*ubi supra*). But an action against a common carrier for *non-delivery* of goods is founded upon contract (*id.*).

(*k*) *Edwards* v. *Mallan* (*ubi supra*).

(*l*) *Turner* v. *Stallibrass* (*ubi supra*).

(*m*) *Pippin* v. *Sheppard*, 11 Price, 401; *Gladwell* v. *Steggall*, 5 Bing. (N.C.) 733.

it was a wrongful act for them to deal negligently with it (*n*). But, in the absence of any duty towards *himself*, B cannot maintain an action upon a contract made between A and the defendant. Thus if A sends a message to B by a telegraph company, and a mistake is made by the company whereby damage is caused to B, no action can be maintained against the telegraph company by B, because there is neither privity of contract between him and the company, whose only contract was with A; nor does the contract cast upon the company any duty towards B (*o*).

Torts which are also Crimes.—The distinction between torts and crimes is that a tort is a wrong for which the *injured person* can obtain *compensation* by *civil proceedings*, whereas a crime is an offence for which *punishment* is exacted *by the State* as a result of *criminal proceedings*. But there is nothing in the nature of an act which determines whether it is a civil injury or a crime, and the same act may be both a tort and a crime. Thus assault and libel are torts, entailing liability to civil proceedings for damages; but they are also punishable as criminal offences.

Where an act is both a tort and a crime the effect upon the civil rights of the injured party depends upon whether the crime was a felony or a misdemeanour. "If injuries are inflicted on an individual under circumstances which constitute a *felony*, that felony cannot be made the foundation of an action at the suit of the person injured against the person who inflicted the injuries, until the latter has been prosecuted or a reasonable excuse shown for his non-prosecution" (*p*). If, therefore, it appears that a plaintiff's cause of action arises out of a felony committed against

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(*n*) *Meux* v. *Great Eastern Railway*, [1895] 2 Q. B. 387; 64 L. J. Q. B. 657; 73 L. T. 247. Compare *Marshall* v. *York, etc., Railway*, 11 C. B. 655; 21 L. J. C. P. 34, where a servant successfully sued for the loss of his luggage, his ticket having been taken by his master.

(*o*) *Dickson* v. *Reuter's Telegram Co.*, 3 C. P. D. 1; 47 L. J. C. P. 1. See also *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626.

(*p*) *Smith* v. *Selwyn*, [1914] 3 K. B., at p. 105; 83 L. J .K. B. 1339; 111 L. T. 195; *Admiralty Commissioners* v. *SS. Amerika*, [1917] A. C. 38; 86 L. J. P. 58; 116 L. T. 34; 33 T. L. R. 135. This rule does not apply (i) where the action is not against the felon himself (*White* v. *Spettigue*, 14 L. J. Ex. 99; 13 M. & W. 603); (ii) where it is not brought by the person against whom the felony was committed (*Appleby* v. *Franklin*, 17 Q. B. D. 93; 55 L. J. Q. B. 129; 54 L. T. 135).

him by the defendant, the Court must stay all proceedings in the action until the defendant has been prosecuted or some reasonable excuse is shown for his non-prosecution, as, for instance, his being out of the country (*q*).

If the tort is merely a *misdemeanour* this rule does not apply, and either civil or criminal proceedings, or both, may be taken. But, at any rate, in case of an assault the Court may refuse to pass sentence in criminal proceedings while an action is pending for the tort.

In the case of assault also, the fact that criminal proceedings have been taken may, under ss. 44 and 45 of *Offences Against the Person Act*, 1861, be a bar to subsequent civil proceedings. These sections provide that if justices, upon the hearing upon the merits of any summary proceedings for assault or battery, shall deem the offence not proved, or to be justified, or to be so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred; and that if any person against whom any such complaint shall have been preferred shall have obtained such a certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, in every such case he (*r*) shall be released from all further or other proceedings, civil or criminal, for the same cause.

Classification of Torts.—The rights of which torts constitute infringement are " (1) rights of reputation; (2) rights of bodily safety and freedom; (3) rights of property, or, in other words, rights relative to the mind, body and estate; and, if the general word ' estate ' is substituted for ' property,' these three rights will

(*q*) *Smith* v. *Selwyn* (*ubi supra*). An application for an order to stay proceedings may be made by the defendant (*id.*).

(*r*) But the conviction of a servant for an assault committed in the course of his employment does not affect the civil liability of his master (*Dyer* v. *Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448). By s. 46, the justices may not adjudicate upon any assault or battery which is accompanied by any attempt to commit felony, or which they shall think a fit subject for prosecution or on which any question arises as to the title to land, or as to any bankruptcy or execution.

be found to embrace all the personal rights that are known to the law " (*s*).

All personal rights are, however, divided into two main classes (*t*), namely:

1. *Absolute rights*, the mere invasion of which gives a right of action irrespective of whether any actual damage has been caused to the plaintiff.

2. *Qualified rights*, of which there is no violation unless the plaintiff has suffered some actual damage.

Thus, in actions for trespass to land and libel, the mere trespass or libel is a cause of action, although the plaintiff has suffered no actual injury or damage; but in an action for personal injuries caused by the negligence of the defendant damage is of the essence of the action.

General Rules Governing Liability in Tort (*u*).

1. " *There is no such thing as a wrong without presupposing a right which is violated* " (*x*). Accordingly, the maxim *Sic utere tuo ut alienum non lædas* means no more than this, that " I must occupy my own so as to do no harm to others; but it is their legal rights only that I am bound not to disturb. Subject to this qualification, I may occupy or use my own as I please " (*y*). This rule applies not only to the use of land, with regard to which some illustrations have been given (*z*), but to the exercise of other rights. Thus the right of a man to carry on his trade or vocation must be co-ordinated with the equal and similar rights of his fellow-traders, and he must put up with any loss caused to him by their lawful exercise of their own rights. Accordingly a trader commits no wrong if, by attractive methods applied to his own business, he allures to himself the customers of his rival, and so destroys the latter's business. But if, going beyond legitimate competition, he interferes with the conduct of his rival's business or molests him or drives away his customers, he goes beyond

(*s*) See the opinion of Cave, J., in *Allen* v. *Flood*, [1898] A. C., at p. 29; 67 L. J. Q. B. 119; 77 L. T. 717.

(*t*) See *Neville* v. *London Express Newspaper*, [1919] A. C., at pp. 379, 392, 405; 88 L. J. K. B. 282; 120 L. T. 299; 35 T. L. R. 167.

(*u*) See also *ante*, p. 6.

(*x*) *Baird* v. *Williamson*, 15 C. B. (N.S.), at p. 388.

(*y*) *Deane* v. *Clayton*, 7 Taunt., at p. 259.

(*z*) *Ante*, p. 7.

legitimate competition and commits an actionable wrong (*a*). So also, though a trader may say of his own goods that they are better than any other similar goods, he will be liable to an action if he causes damage to a rival by a false disparagement of the latter's goods (*b*).

2. *Every malicious invasion of civil rights is actionable.*—Malice in this sense does not mean what is sometimes called "malice in fact" or "express malice," *i.e.*, ill-will or improper motive, but "malice in law," which exists whenever a wrongful act is done intentionally (*i.e.*, wilfully or voluntarily and not by accident), without justification or excuse (*c*). Thus in the case of *Wilkinson* v. *Downton* (*d*), the defendant, as a practical joke, represented to the plaintiff that her husband had met with a serious accident, so causing a severe shock to her nervous system and permanent physical consequences. It was held that these facts constituted a good cause of action. The defendant wilfully and without justification did an act infringing the right of the plaintiff to personal safety and this wilful *injuria* was in law malicious, although there was in fact no malicious purpose or motive of spite.

The above rule is, however, subject to one exception. Where the wrong consists merely in the violation of a public right, as, *e.g.*, in the case of an obstruction of a public highway, an action cannot be maintained except by a person who has suffered some peculiar damage, beyond that suffered by the rest of the public who use the way (*e*).

3. *The exercise of a legal right is not wrongful because it is prompted by malice in fact or improper motive* (*f*). But the

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(*a*) See *Mogul SS. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; *Allen* v. *Flood* (*ante*, p. 8); *Quinn* v. *Leathem*, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; 17 T. L. R. 749; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244; 88 L. J. K. B. 628; 120 L. T. 41; 35 T. L. R. 14.

(*b*) *White* v. *Mellin*, [1895] A. C. 154; 64 L. J. Ch. 308; 72 L. T. 334.

(*c*) *Bromage* v. *Prosser*, 4 B. & C., at p. 255; *Allen* v. *Flood*, [1898] A. C., at pp. 93, 94, 124.

(*d*) [1897] 2 Q. B. 57; 66 L. J. Q. B. 493, approved in *Janvier* v. *Sweeney*, [1919] 2 K. B. 316; 121 L. T. 179; 35 T. L. R. 360. See also *Dulieu* v. *White*, [1901] 2 K. B. 669; 70 L. J. K. B. 837; 85 L. T. 126.

(*e*) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316; 36 L. J. Ex. 194; 16 L. T. 771.

(*f*) *Quinn* v. *Leathem*, [1901] A. C., at p. 524. See also *Bradford Corporation* v. *Pickles*, [1895] A. C. 587 (*ante*, p. 8); *Allen* v. *Flood* (*ante*, p. 8).

presence of malice in fact may negative the existence of justification or excuse. Thus a libel is in law malicious, and the plaintiff need not in the first instance allege that the defendant was actuated by malice in fact; libel is, however, excused if the words complained of were used on a privileged occasion; but that excuse may be rebutted by proof of express malice and abuse of the privilege (*g*). So also, "it is not a wrongful act for a person who honestly believes that he has a reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive . . . is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice, becomes with malice wrongful and actionable" (*h*).

Conversely, if a person commits an unlawful act, the absence of an improper motive is no defence (*i*).

4. *Where no absolute right has been infringed an action will lie only if* (i) *the plaintiff has suffered some "special damage" (i.e., actual loss or injury) and* (ii) *such damage was caused by an unjustifiable act or breach of duty on the part of the defendant* (*k*). Thus, in ordinary circumstances, an action for trespass to land is an action for the violation of an absolute right and is maintainable without proof that the plaintiff has suffered any special damage (*l*), or that the defendant was guilty of negligence (*m*). But the owner of land adjoining a highway has no such absolute right, and can maintain an action only in respect of damage wilfully or negligently done to his property by persons using the highway (*n*). So also, a passenger upon a highway must "put

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(*g*) *Allen* v. *Flood*, [1898] A. C., at p. 172. See also *id.*, p. 126.

(*h*) *Quinn* v. *Leathem*, [1901] A. C., at p. 524. If the defendant *knew* that he had no reasonable and probable cause, the prosecution would be malicious in law, and no proof of malice in fact would be necessary (*ibid.*).

(*i*) *Allen* v. *Flood*, [1898] A. C., at p. 124. Cf. *Derry* v. *Peek*, 14 A. C., at p. 374 (*ante*, p. 89).

(*k*) *Bowen* v. *Hall*, 6 Q. B. D. 333; 50 L. J. Q. B. 305; 44 L. T. 75; *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794.

(*l*) *Williams* v. *Morland*, 2 B. & C., at p. 916.

(*m*) *Humphries* v. *Cousins*, 2 C. P. D. 239; 46 L. J. C. P. 438; 36 L. T. 180.

(*n*) *River Weir Commissioners* v. *Adamson*, 2 A. C., at p. 767; 46 L. J. Q. B. 83; 37 L. T. 543. See also *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J. Q. B. 61; 47 L. T. 546 (an ox being driven along a highway entered the plaintiff's shop and damaged his goods. *Held*, no action would lie in the absence of negligence on the part of the driver).

up with such mischief as reasonable care on the part of others cannot avoid " (*o*).

Failure to Perform Statutory Duties.—Where a duty is imposed by statute the question whether a person who has sustained injury from the non-performance of that duty can maintain an action for damages against the person on whom the duty is imposed depends upon " the scope and purpose of the statute and, in particular, for whose benefit it is intended " (*p*). If the duty is imposed for the benefit of particular persons, there arises at Common Law a correlative right on those persons who may be injured by its contravention, and the fact that a penalty is imposed does not detract from their right to enforce the civil liability (*q*). But where the duty is imposed for the benefit of the public generally or for a large section of the public, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, there is no separate right of action to every person injured, by breach of the obligation, in no other manner than the rest of the public; in such cases, therefore, the only remedy is to take such proceedings for such penalties, if any, as are provided by the statute (*r*). And,

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(*o*) *Holmes* v. *Mather*, L. R. 10 Ex. 261; 44 L. J. Ex. 176; 33 L. T. 361 (plaintiff injured by runaway horse. *Held*, that in the absence of negligence, no action lay). Compare, however, *Gaylor* v. *Davies*, [1924] 2 K. B. 75; 93 L. J. K. B. 702; 131 L. T. 507; 40 T. L. R. 591, in which McCardie, J., reviewing the authorities and applying the rule stated in *River Weir Commissioners* v. *Adamson* (*ubi supra*), held that the bolting of a horse left unattended in a public street is *prima facie* evidence of negligence.

(*p*) *Butler* v. *Fife Coal Co., Ltd.*, [1912] A. C., at pp. 155, 156, affirming *Atkinson* v. *Newcastle Waterworks Co.*, 2 Ex. D. 441; 46 L. J. Ex. 775; 36 L. T. 761; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; 62 L. J. Q. B. 65; 67 L. T. 486. See also *Hemmings* v. *Stoke Poges Golf Club*, [1920] 1 K. B., at p. 732; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77.

(*q*) *Butler* v. *Fife Coal Co., Ltd.* (*ubi supra*) (*Held*, that an action lay against a mine owner for a breach of statutory regulations imposed for the benefit of the miners). See also *Harnett* v. *Fisher*, [1927] 1 K. B. 402, in which it was held that a medical man who undertakes the statutory duty of giving a certificate under s. 4 of the Lunacy Act must use reasonable care and, if he fails to do so, is liable for the damage caused to the person in respect of whom the certificate is given.

(*r*) *Clegg Parkinson & Co.* v. *Earby Gas Co.*, [1896] 1 Q. B. 592; 65 L. J. Q. B. 339 (*Held*, that no action lay against a gas company for failure to supply gas of sufficient amount and purity to satisfy the requirements of the Acts by which it was regulated). Compare *Saunders* v. *Holborn Board of Works*, [1895] 1 Q. B. 164; 64 L. J. Q. B. 101; 71 L. T. 519; *Maguire* v.

if a statutory duty is imposed to prevent damage of a particular kind, no action can be maintained for a breach of the statute which causes damage of a different kind (*s*).

It should, in particular, be noticed that no action lies against a highway authority for non-feasance, *i.e.*, for damages caused by mere non-repair of the highway (*t*). But it is liable for misfeasance (*u*).

Who May Sue and be Sued in Tort.—As a general rule, every person may sue and be sued in an action of tort. To this rule there are, however, certain exceptions, of which the following are the most important:

1. An alien enemy cannot sue (*x*).

2. A "convict," *i.e.*, a person against whom judgment of death or of penal servitude has been pronounced or recorded upon any charge of treason or felony, cannot, during the continuance of his sentence, bring any action for the recovery of any property, debt, or damage, or alienate or charge any property, or make any contract, except while lawfully at large under any licence (*y*).

3. A contract cannot be converted into a tort so as to enable an infant to be sued (*z*).

4. A husband cannot sue his wife in tort; a wife cannot sue her husband in tort except "for the protection and security of her own separate property" (*a*).

Liverpool Corporation, [1905] 1 K. B. 767; 74 L. J. K. B. 369; 21 T. L. R. 278 (reviewing many earlier authorities); *Phillips* v. *Britannic, etc., Laundry Co.*, [1923] 2 K. B. 832; 129 L. T. 777; 39 T. L. R. 530.

(*s*) *Gorris* v. *Scott*, L. R. 9 Ex. 125; 43 L. J. Ex. 92; 30 L. T. 431. See also *Ward* v. *Hobbs*, 4 A. C., at p. 23; 48 L. J. C. P. 281; 40 L. T. 73.

(*t*) *McKinnon* v. *Penson*, 9 Ex. 609; 23 L. J. M. C. 97; *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345; 62 L. J. Q. B. 65; 67 L. T. 486; *Thompson* v. *Brighton Corporation*, [1894] 1 Q. B. 332; 63 L. J. Q. B. 181; 70 L. T. 206; *Municipal Council of Sydney* v. *Bourke*, [1895] A. C. 433; 72 L. T. 605.

(*u*) *Post*, p. 503.

(*x*) *Ante*, p. 152.

(*y*) 33 & 34 Vict. c. 23, ss. 6—8, 20. By other sections of the Act, provisions are made for the appointment of *administrators*, to whom the custody and management of a convict's property are committed.

(*z*) *Ante*, p. 142.

(*a*) Married Women's Property Act, 1882, s. 12. See *Shipman* v. *Shipman*, [1924] 2 Ch. 140; 93 L. J. Ch. 182; 131 L. T. 394.

5. Subject to exceptions already noted (*b*), the personal representatives of a deceased person cannot sue or be sued in tort.

6. A corporation cannot sue for a tort merely affecting its reputation (*c*). It can generally be sued to the same extent as a private person for the acts of its servants (*d*). The liability of a body created by statute depends, however, upon the statute by which it is created, but in the absence of anything to show a contrary intent it has the same Common Law duties and liabilities as a private person except that, as we have just seen, it cannot be sued for mere non-performance of a statutory duty except by a person for whose particular benefit the duty was imposed (*e*).

7. A trade union cannot be sued for a tort (*f*).

8. The Crown cannot be sued in tort (*g*).

Joint tortfeasors.—All persons who jointly commit a tort are jointly and severally liable for the whole damage, and may be sued jointly or separately (*h*). But there is only one cause of action, so that a judgment against one is a bar to an action

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(*b*) *Ante*, pp. 10, 11.

(*c*) *Manchester Corporation* v. *Williams*, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23; 63 L. T. 805. It can sue for a libel affecting its property but not for a libel merely affecting personal reputation (*id.*). Thus, a trading corporation can sue in respect of a libel reflecting on the management of its business, and need not prove any actual pecuniary damage (*South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293; 69 L. T. 844).

(*d*) It is now settled that a corporation is liable for the acts of its servants even in cases in which malice in fact is material, as, *e.g.*, in malicious prosecution (*Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196), and libel (*Citizens Life Assurance Co.* v. *Brown*, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739).

(*e*) *Sanitary Commissioners of Gibraltar* v. *Orfila*, 15 A. C., at pp. 408, 412; 59 L. J. P. C. 95; 63 L. T. 58.

(*f*) Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 4.

(*g*) See *Attorney-General* v. *De Keyser's Hotel*, [1920] A. C., at p. 532; 89 L. J. Ch. 417; 122 L. T. 691; 36 T. L. R. 600. Therefore "the principle of *respondeat superior* does not apply to the Crown where a wrong is committed by its officers" (*id.*). But the person who does the act is liable in damages as any private person would be (*Johnstone* v. *Pedlar*, [1921] 2 A. C. 262). An officer of State cannot be sued as such for the acts or defaults of his subordinates, though he may be liable in his private capacity if he has expressly ordered the performance of a wrongful act (*Raleigh* v. *Goschen*, [1898] 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429). See also *Bainbridge* v. *The Postmaster-General*, [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 22 T. L. R. 70.

(*h*) *Sutton* v. *Clarke*, 6 Taunt. 29. As to collisions between ships, see, however, s. 1 of Maritime Conventions Act, 1911.

against the rest, even though it has not been satisfied (*i*), and a release of one (*k*) or satisfaction by one (*l*) releases all.

But, in order to constitute two persons joint tortfeasors, there must be one wrongful act committed by one on behalf of or in concert with the other, as, *e.g.*, where an agent commits a wrongful act within the scope of his authority for his principal, or where two persons agree in common action, in the course of which, and to further which, they commit a wrongful act; there is no joint tortfeasance merely because the separate and independent wrongful acts of two persons cause one damage (*m*).

If a plaintiff, having recovered judgment against several tortfeasors, levies the whole damages upon one, that one has no right to recover contribution from the others (*n*). An exception to this rule exists, however, under s. 84 of the *Companies (Consolidation) Act*, 1908, which provides that every person who becomes liable to pay compensation under that section may recover contribution from any other person who, if sued separately, would have been liable to make the same payment, unless the person who so becomes liable was, and the other person was not, guilty of fraudulent misrepresentation.

On the same principle, if an agent is employed to do some act which "is manifestly unlawful or which [he knows] to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. But an action for indemnity, grounded either on deceit or warranty, may be maintained where the party who seeks the indemnity has incurred damage by reason of his having been authorised or fraudulently induced by another to do an act indifferent in itself, which has turned out, because it constitutes a private wrong, to be unlawful, but which was not at the time

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(*i*) *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; 41 L. J. C. P. 190.

(*k*) *Duck* v. *Mayeu*, [1892] 2 Q. B. 511; 62 L. J. Q. B. 69; 67 L. T. 547; but a mere covenant not to sue one of several joint tortfeasors does not release the rest (*id.*).

(*l*) *Thurman* v. *Wilde*, 11 A. & E. 453.

(*m*) *The Koursk*, [1924] P. 140; 93 L. J. P. 72; 131 L. T. 700; 40 T. L. R. 399 (reviewing the authorities as to joint tortfeasors).

(*n*) *Merryweather* v. *Nixon*, 8 T. R. 186.

apparently unlawful, and was done in honest ignorance of the particular circumstances which constituted its unlawfulness " (*o*).

General Exceptions to Liability and Defences.

1. *Acts of State.*—No action can be brought by any person who is *not* at the time of that act a subject of the King for any act done *out of British territory* by any representative of the Crown, civil or military, which is previously sanctioned or subsequently ratified by the Crown (*p*).

2. *Judicial Acts.*—No action lies against a Judge for anything done or said by him in his judicial capacity, even though he acts maliciously (*q*). This doctrine applies to all Courts, whether civil or military, *e.g.*, to a County Court (*r*), to the Court of a coroner (*r*), to a Court-martial (*r*), to Justices of the Peace sitting in petty sessions (*s*) or exercising any other judicial function (*t*), to proceedings held before a Registrar in Bankruptcy upon the examination of a debtor (*u*), to reports of an official receiver or officer appointed by the Board of Trade made, on the winding-up of a company, in the performance of their statutory duties (*x*), and to a Consular Court (*y*) and, to some extent to an arbitrator, who, if he acts honestly, is not liable for a mistake or error of judgment or even for negligence (*z*).

(*o*) *Burrows* v. *Rhodes*, [1899] 1 Q. B., at p. 828; 68 L. J. Q. B. 545; 80 L. T. 591; 15 T. L. R. 286.

(*p*) *Buron* v. *Denman*, 2 Ex. 167; *Johnstone* v. *Pedlar*, [1921] 2 A. C. 262; 37 T. L. R. 870. The term " act of State " includes any act which is done " not in the exercise or recognition of any legal right," but " as an exercise of sovereign power." Hence it cannot be challenged, controlled or interfered with by municipal Courts (*Salaman* v. *Secretary of State for India*, [1906] 1 K. B., at pp. 633, 639; 75 L. J. K. B. 418; 94 L. T. 458).

(*q*) *Scott* v. *Stansfield*, L. R. 3 Ex. 220; 37 L. J. Ex. 135; 18 L. T. 572; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668; 71 L. T. 382.

(*r*) *Scott* v. *Stansfield* (*ubi supra*). As to courts-martial, see also *Dawkins* v. *Rokeby* (*Lord*), L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196.

(*s*) *Law* v. *Llewellyn*, [1906] 1 K. B. 487; 75 L. J. K. B. 320; 94 L. T. 359.

(*t*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

(*u*) *Ryalls* v. *Leader*, L. R. 1 Ex. 296; 35 L. J. Ex. 185; 14 L. T. 563.

(*x*) *Bottomley* v. *Brougham*, [1908] 1 K. B. 584; 77 L. J. K. B. 311; 99 L. T. 111; 24 T. L. R. 262; *Burr* v. *Smith*, [1909] 2 K. B. 306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542.

(*y*) *Haggard* v. *Pélicier Frères*, [1892] A. C. 61; 61 L. J. P. C. 19; 65 L. T. 769.

(*z*) *Pappa* v. *Rose*, L. R. 7 C. P. 525; 41 L. J. C. P. 187; 27 L. T. 348; *Chambers* v. *Goldthorpe*, [1901] 1 Q. B. 624; 70 L. J. K. B. 482; 84 L. T. 444; 17 T. L. R. 304.

But the protection extends only to persons acting as a Judge or member of a "Court"; it does not therefore apply to persons exercising what are merely administrative functions, *e.g.*, to a meeting of the London County Council for the purpose of granting music and dancing licences (*a*).

And, if the Judge of a Court of *limited* jurisdiction does an act which is not within his jurisdiction, he has no protection if he was not misinformed as to the facts and knew or ought to have known that he had no jurisdiction (*b*).

3. *Executive acts.*—An executive officer, such as a bailiff, constable, or governor of a prison, is not liable for acts done in regular execution of an apparently regular warrant or order issued by a person who has jurisdiction to do so (*c*). The same exemption from liability applies to acts of naval or military officers done in the execution of their duty (*d*).

4. *Statutory authority.*—Where statutory powers are given which cannot be exercised without causing injury which would in ordinary circumstances be actionable, it must be taken that power is given to cause that injury without liability to an action (*e*).

Thus it is settled by a series of decisions that the power to take land compulsorily which is given by the Railway Acts authorises the use of the land so taken for any purpose necessary to the exercise by the railway company of its powers, without any liability to be sued for causing a nuisance, provided always that negligence is absent (*f*).

(*a*) *Royal Aquarium Society, Ltd.* v. *Parkinson*, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409; 66 L. T. 513.

(*b*) *Anderson* v. *Gorrie*, [1895] 1 Q. B., at p. 671; *Houlden* v. *Smith*, 14 Q. B. 841; 19 L. J. Q. B. 170; *Willis* v. *McLachlan*, 1 Ex. D. 376; 45 L. J. Q. B. 689; 35 L. T. 218.

(*c*) *Mayor, etc., of London* v. *Cox*, L. R. 2 H. L., at p. 269; 36 L. J. Ex. 225; *Henderson* v. *Preston*, 21 Q. B. D. 362; 57 L. J. Q. B. 607. A constable acting under a justice's warrant is also protected by statute (24 Geo. 2, c. 44, s. 6), notwithstanding any defect of jurisdiction, provided that he produces the warrant within six days after demand in writing.

(*d*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; 21 L. T. 584. "The civil Courts cannot be invoked to redress grievances arising between persons both subject to military law"; *Marks* v. *Frogley*, [1898] 1 Q. B., at p. 900; 67 L. J. Q. B. 605; 78 L. T. 607; 14 T. L. R. 393.

(*e*) *Hammersmith, etc., Railway Co.* v. *Brand*, L. R. 4 H. L., at p. 202; 38 L. J. Q. B. 265; 21 L. T. 238 (damage to houses unavoidably caused by the vibration of engines which the railway company was authorised by statute to use).

(*f*) *R.* v. *Pease*, 4 B. & Ad. 30; *Hammersmith, etc., Railway Co.* v. *Brand*, L. R. 4 H. L. 171; 38 L. J. Q. B. 265; 21 L. T. 238; *London, Brighton and*

But " the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals to show that by express words or by necessary implication that intention appears " (*g*). A distinction must therefore be drawn between statutes which *imperatively direct* the doing of an act which must necessarily cause an infringement of civil rights and statutes which are merely *permissive*. If an authority given by statute is permissive merely and not imperative, the Legislature must be taken to have intended that it is not to be exercised in prejudice of the Common Law rights of others (*h*). Thus where the defendants, under powers given by a public statute (the Metropolitan Poor Act, 1867) had authority to erect hospitals for the poor of the Metropolis, and built a small-pox hospital which was a nuisance to adjoining owners, it was held that they were not protected by the statute, which did not authorise a particular use of a specific building in a specified position which could not be so used without occasioning nuisance, nor imperatively direct that a building should be provided within a certain area and so used, it being an established fact that nuisance must be the result, but which was merely permissive and gave no authority to erect a hospital which was a nuisance (*i*).

So also, though no action lies against a highway authority for mere *non-feasance*, it is liable for *misfeasance* in the execution of its powers, as, for example, if in making up, altering, or diverting a highway, it creates some danger or omits some precaution which

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South Coast Railway v. *Truman*, 11 A. C. 45; 55 L. J. Ch. 354; 54 L. T. 250. In the last case a nuisance was created upon land which was not acquired under compulsory powers but under a power given by the particular Act of buying land by agreement, not exceeding fifty acres, for the purpose of receiving cattle conveyed, or intended to be conveyed, on the railway. It was held, however, that the Act must have intended that this additional land (which from the nature of the authorised purposes of the railway must be contiguous to the railway) should enjoy the same immunity as if it had been acquired under a compulsory power.

(*g*) *Metropolitan Asylum District* v. *Hill*, 6 A. C., at p. 208; 50 L. J. Q. B. 353; 53 L. T. 163.

(*h*) *Id.*; and *Canadian Pacific Railway* v. *Parke*, [1899] A. C., at p. 545; 68 L. J. P. C. 89; 81 L. T. 127; 15 T. L. R. 427. Even when a statute is imperative the onus of proving that it cannot be obeyed without infringing civil rights lies upon the defendant (6 A. C., at p. 213).

(*i*) *Metropolitan Asylum District* v. *Hill*, 6 A. C. 193, explained and distinguished in *London, Brighton and South Coast Railway* v. *Truman* (*ubi supra*).

would have made the work safe instead of dangerous (*k*). And if a highway authority or other local authority creates upon or under a highway an artificial work, such as a grating or sewer, and *negligently* allows it to become in such a condition as to amount to a nuisance, it is liable to an action at the suit of any person who has in consequence suffered damage while using the highway (*l*). But if an artificial work lawfully erected by the defendant is itself in perfect repair, he is not liable if it becomes dangerous through extraneous causes for which he is not responsible (*m*).

5. *Accident.*—It is a defence to show that the act complained of was due to inevitable accident—that is to say, to some "superior agency" (*n*) or "external happening over which the defendant had no control" (*o*), so that it was not really the

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(*k*) See, *e.g.*, *Whyler* v. *Bingham Rural Council*, [1901] 1 Q. B. 45; 70 L. J. K. B. 207; 83 L. T. 652; 17 T. L. R. 23; *McClelland* v. *Manchester Corporation*, [1912] 1 K. B. 118. If something has been done to the road, the case is removed from the category of non-feasance and becomes misfeasance, although damage is caused by the omission to do something which ought to be done, [1912] 1 K. B., at p. 127.

(*l*) *Lambert* v. *Lowestoft Corporation*, [1901] 1 K. B. 590; 70 L. J. K. B. 333; 84 L. T. 337; 17 T. L. R. 373.

(*m*) *Moore* v. *Lambeth Waterworks Co.*, 17 Q. B. D. 462; 55 L. J. Q. B. 309 (approved in *Great Central Railway* v. *Hewlett*, [1916] 2 A. C. 511; 85 L. J. K. B. 1705; 32 T. L. R. 707). Here the defendants had lawfully fixed in the pavement a fire-plug which, through the wearing away of the pavement, projected above its surface and tripped the plaintiff. It was held that, as the fire-plug itself was in good order, the defendants were not liable. In *Thompson* v. *Brighton Corporation* (*ubi supra*) similar facts were held to create no cause of action against the defendants, who were both highways and sewer authorities, and, in the latter capacity, had placed in the highway the cover of a manhole. And a defendant who has merely statutory authority to "maintain" in the highway what would otherwise be an obstruction and a nuisance is not liable for damages resulting from its existence in the highway: see *Great Central Railway* v. *Hewlett* (*ubi supra*), where the defendants, having statutory authority to "maintain" gate-posts in the highway, were held not to be subject to any duty to light them or give any warning of their existence to the public, who must take the highway as they find it, subject to all legal obstructions, and just as if the posts had been in existence before the highway was dedicated. This last case was distinguished in *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B. 866; 86 L. J. K. B. 1456; 117 L. T. 520; 33 T. L. R. 492, where the defendants, having statutory power to erect in the highway trees and guards for the same so as not to become a nuisance, were held liable for damage caused by a spiked guard to a foot-passenger who walked into it on a night when, owing to a lighting order, the street lights were out, it being their duty to use reasonable care that their guards should not be a danger to the public and the jury having found that they were negligent.

(*n*) *Hall* v. *Fearnley*, 3 Q. B. 919.

(*o*) *Sadler* v. *South Staffordshire, etc., Tramways Co.*, 23 Q. B. D., at p. 21; 58 L. J. Q. B. 421.

result of any voluntary act or omission on his part. But, as will be seen later, if a defendant voluntarily commits a wrongful act, it is no defence that the consequences were accidental in the sense that they were of a kind which he did not contemplate.

6. *Defence of person or property.*—This is usually found raised as a defence to an action of assault, but it may occur in other cases also. Thus an owner of land on or near a river may protect himself from floods by building a barrier *on his own ground*, and, provided that he does not interfere with or obstruct the natural flow of the river, either in its ordinary bed or in any regular flood-channel, he is not responsible for any damage which he occasions to his neighbour by throwing the whole overflow upon the latter's land (*p*).

7. *Leave and licence, Volenti non fit injuria.*—It is a good defence to a civil action that the act complained of was done by the consent of the plaintiff, or that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it (*q*).

8. *Parental, or quasi-parental, authority.*—Thus a father "has the right to inflict reasonable personal chastisement on his son . . . [and] he may delegate this right to the schoolmaster" (*r*).

9. *Release*, or *accord and satisfaction* may also constitute defences to an action of tort (*s*).

10. *Discharge in bankruptcy.*—An order of discharge in

(*p*) *Gerrard* v. *Crowe*, [1921] 1 A. C. 395; 90 L. J. P. C. 42; 124 L. T. 486; and see *Nield* v. *London and North Western Railway*, L. R. 10 Ex. 4; 44 L. J. Ex. 15. But though a person may thus defend himself from an extraordinary danger before it has happened to him, he may not, if something dangerous has come on his land, transfer the misfortune to his neighbour (*Whalley* v. *Lancashire and Yorkshire Railway*, 13 Q. B. D. 131; 53 L. J. Q. B. 285; 50 L. T. 272).

(*q*) See *Letang* v. *Ottawa Electric Railway*, [1926] A. C. 725; 95 L. J. C. P. 153; 135 L. T. 421; 42 T. L. R. 396. For a discussion of this principle as applied to criminal proceedings for assault, see *R.* v. *Coney*, 8 Q. B. D. 534; 51 L. J. M. C. 66; 46 L. T. 307.

(*r*) *Cleary* v. *Booth*, [1893] 1 Q. B. 465; 62 L. J. M. C. 87; 68 L. T. 349. The authority of the schoolmaster to punish is not limited to acts committed on the school premises. In the case of the *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 21 T. L. R. 441, it was suggested that the "claims of relationship or guardianship" may constitute a defence to an action for inducing a breach of contract where they "demand an interference amounting to protection."

(*s*) See *ante*, pp. 168—171; see also *Boosey* v. *Wood*, 3 H. & C. 484; 34 L. J. Ex. 65; 140 R. R. 565; *Read* v. *Great Eastern Railway*, L. R. 3 Q. B. 555; 37 L. J. Q. B. 278; 18 L. T. 82.

bankruptcy releases a bankrupt from liabilities provable in bankruptcy (*t*). Claims for unliquidated damages for tort are not, however, provable in bankruptcy (*u*).

11. *Statutes of Limitations.*—The period of limitation for all actions of tort is *six years* (*x*), except—

(i) in actions for trespass to the person by *assault*, *battery*, or *false imprisonment*, when it is *four years* (*x*);

(ii) in actions for *slander actionable without proof of special damage*, when it is *two years* (*x*);

(iii) in actions for the *infringement of copyright*, when it is *two years* (*y*);

(iv) in actions within *Article III. of the Schedule to the Carriage of Goods by Sea Act*, 1924, when it is one year (*z*);

(v) in actions within s. 8 of the *Maritime Conventions Act*, 1911, *i.e.*, actions for loss or damage to a vessel, her cargo or freight, or any property on board, or for loss of life or personal injury to a person on board a vessel owing to a collision caused by the fault of another vessel, when it is *two years;*

(vi) in actions under *Lord Campbell's Act*, when it is *one year from the death* of the deceased (*a*);

(vii) in actions under the *Employers' Liability Act*, 1880, when it is *six months from the injury* or *one year from the death* (*b*);

(viii) in actions or other proceedings against any person for any act done in pursuance or execution, or intended execution of any Act of Parliament, or any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, when, *under the Public Authorities Protec-*

(*t*) Bankruptcy Act, 1914, s. 28 (2). See, however, s. 28 (1) as to liability under a judgment for seduction, from which the bankrupt is not entirely released by discharge.
(*u*) *Id.*, s. 30 (1).
(*x*) Limitation Act, 1623 (21 Jac. 1, c. 16, s. 3).
(*y*) Copyright Act, 1911, s. 10.
(*z*) See *ante*, p. 337.
(*a*) Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), s. 3.
(*b*) 43 & 44 Vict. c. 42, s. 4.

tion Act, 1893 (*c*), it is *six months from the act, neglect or default, or, in case of a continuance of injury or damage, within six months from its ceasing* (*d*).

If the action is for the infringement of an absolute right the period runs from the date of the infringement (*e*). But if special damage is the gist of the action, the period runs only from the date when the damage was incurred (*f*). If the defendant has

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(*c*) 56 & 57 Vict. c. 61, s. 1. If in such an action judgment is obtained by the defendant it carries costs, to be taxed as between solicitor and client. If the proceeding is an action for damages, *tender of amends* before action may be pleaded, in lieu of, or in addition to, any other plea. If the action is commenced after such tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he gets no costs incurred after the tender or payment, from which time also the defendant gets costs as between solicitor and client. And if the plaintiff has not given the defendant a sufficient opportunity of tendering amends, the Court *may* award the defendant costs as between solicitor and client (*ibid.*). The Act applies to servants of the Crown acting within the scope of their public duties (*The Danube II.*, [1921] P. 183; 90 L. J. P. 314; 37 T. L. R. 421). The protection of the Act applies only to acts done in direct execution of a statute, or in the discharge of a public duty or the exercise of a public authority, not to acts done under a contract which the public authority merely had power to make but need not have made (*Bradford Corporation* v. *Myers*, [1916] 1 A. C. 242; 85 L. J. K. B. 146; 114 L. T. 83; 32 T. L. R. 113). Nor does the Act protect an independent contractor doing under contract, and for his own profit, works which a public body is authorised to do (*Tilling, Ltd.* v. *Dick, Kerr & Co., Ltd.*, [1905] 1 K. B. 562; 74 L. J. K. B. 359; 92 L. T. 371; 14 T. L. R. 205).

(*d*) The words " continuance of injury or damage " mean the continuance of the act which caused the damage, so that where there is one act causing damage which gradually develops, time runs from the act and not from the latest damage (*Carey* v. *Bermondsey Borough Council*, 67 J. P. 447). But this rule does not apply where there is a continuous act or omission causing continuous damage, as *e.g.*, where after the original act there is a legal duty to avert its consequences, neglect of which is a continuing breach from day to day, and in such a case time does not begin to run while that duty remains undischarged (see *Huyton, etc., Gas Co.* v. *Liverpool Corporation*, [1926] 1 K. B. 146; 95 L. J. K. B. 269; 134 L. T. 203; 42 T. L. R. 126, and note judgment of Atkin, L.J., recapitulating the variations of facts to which the words of the statute may apply).

(*e*) If there is a conversion of property by A, from whom it is received by B, time runs, so far as concerns B, from the date of demand made upon and refused by him, not from the date of the original conversion by A (*Miller* v. *Dell*, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404; 63 L. T. 393).

(*f*) *Backhouse* v. *Bonomi*, 9 H. L. C. 503; 34 L. J. Q. B. 181; *Darley Main Colliery Co.* v. *Mitchell*, 11 A. C. 127; 55 L. J. Q. B. 529; 54 L. T. 882. But under the decision in *Carey's Case* (*ubi supra*), in cases which fall within the Public Authorities Protection Act, 1893, and in which there is no cause of action unless some special damage has been suffered, the injured party cannot sue unless the special damage has accrued within six months from the date of the act, neglect or default, and therefore may lose his cause of action before he has got it (*Freeborn* v. *Leeming*, [1926] 1 K. B. 160; 95 L. J. K. B. 114; 134 L. T. 117; 42 T. L. R. 119).

fraudulently concealed his wrong the time does not begin to run so long as the plaintiff, without any fault on his part, is in ignorance of the wrong (*g*). If the plaintiff was an infant or *non compos mentis* when the cause of action accrued, time does not begin to run until his disability ceases: if the defendant was beyond seas when it accrued, time does not begin to run until his return (*h*).

12. *Torts committed abroad.*—To enable an action to be maintained in this country for a tort committed outside the jurisdiction two conditions must be fulfilled: "First the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done" (*i*). The Courts of this country have, however, no jurisdiction to entertain an action to recover damages for a trespass to land situate in a foreign country (*k*).

Remedies for Torts.

The Common Law remedies for torts were both extra-judicial and judicial. The former class includes the remedies of expulsion of a trespasser, recaption of goods wrongfully taken, distress damage feasant, and abatement of nuisances, all of which will be considered. The only judicial remedy at Common Law was an action of damages; in Equity, however, the remedy of an injunction might be granted: a statutory remedy was also given by the Fatal Accidents Act, 1846.

(*g*) *Ante*, p. 194; and see *Bulli Coal Mining Co.* v. *Osborne*, [1899] A. C. 351; 68 L. J. P. C. 49; 80 L. T. 430 (abstraction of coal by a secret underground trespass).

(*h*) *Ante*, p. 189. A person wrongfully detained under a reception order is not *non compos mentis* within the meaning of the statute, see *Harnett* v. *Fisher*, [1927] 1 K. B. 402.

(*i*) *Phillips* v. *Eyre*, L. R. 6 Q. B., at p. 28; 40 L. J. Q. B. 28; 22 L. T. 869; *Machado* v. *Fontes*, [1897] 2 Q. B., at p. 233; 66 L. J. Q. B. 542; 76 L. T. 588. *Walpole* v. *Canadian Northern Railway Co.*, [1923] A. C. 113; 92 L. J. C. 39; 128 L. T. 289; 39 T. L. R. 16. It is not necessary that the act should be the subject of *civil* proceedings in the foreign country; it is sufficient that it is punishable by criminal proceedings (*Machado* v. *Fontes*, *ubi supra*). The fact that in the foreign country civil proceedings must be preceded by criminal proceedings does not affect the right to sue in England, being merely a matter of procedure (*Scott* v. *Lord Seymour*, 32 L. J. Ex. 61; 1 H. & C. 219).

(*k*) *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; 63 L. J. Q. B. 70; 69 L. T. 604.

Damages.—In cases of tort, as in cases of breach of contract, the assessment of damages was, as a general rule, governed by the principle of compensation for the injury and loss sustained by the plaintiff.

Thus in action for damages for personal injuries caused by the negligence of the defendant the plaintiff, "besides a reasonable sum for the pain and suffering he has endured, and the expense he has incurred for medical and other necessary attendance during the period of his illness, has always been allowed to recover a fair recompense for the loss of profits of his profession or business during his enforced absence from it, whether temporary or presumably permanent" (*l*). And the fact that the plaintiff has through an insurance received compensation for his accident cannot be set up by the defendant in mitigation of damages (*m*).

It is now also settled that damages can be recovered not only for immediate physical injuries, but for injuries resulting from nervous shock directly caused by the defendant's tort, whether such shock was due to the plaintiff's fear for his own safety or to his fear for the safety of a member of his family (*n*). Thus, in a recent case (*o*) the defendant's servant left a motor lorry unattended and with its engine running at the top of a steep hill. The lorry ran away down the hill, in the course of which there was a bend. The plaintiff's wife saw the lorry rushing down hill towards her and became frightened for the safety of her children who were out of her sight round the bend and in the

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(*l*) *Phillips* v. *London and South Western Railway*, 5 C. P. D., at p. 284; 49 L. J. C. P. 233; 42 L. T. 6. In this case the jury at the first trial awarded to the plaintiff, who was a physician of eminence, the sum of £7,000 as damages, and a new trial was directed by the Court of Appeal (5 Q. B. D. 78; affirming the decision of the Queen's Bench Division : 4 Q. B. D. 406), on the ground that the jury had failed to take into account all the heads of damage. At the second trial the jury awarded £16,000, and an appeal on the ground that the damages were excessive was unsuccessful. The various judgments contain very full discussions of the principles applicable. See also *Johnston* v. *Great Western Railway*, [1904] 2 K. B. 250; 73 L. J. K. B. 568; 91 L. T. 157; 20 T. L. R. 455.

(*m*) *Bradburn* v. *Great Western Railway*, L. R. 10 Ex. 1; 44 L. J. Ex. 9.

(*n*) *Hambrook* v. *Stokes*, [1925] 1 K. B. 141; 94 L. J. K. B. 435; 132 L. T. 407; 41 T. L. R. 125.

(*o*) *Hambrook* v. *Stokes* (*ubi supra*). This case still leaves open the question as to whether A, who is a mere bystander, can recover damages for injury caused by nervous shock which results from his being a witness of an actual or apprehended injury to B. Apparently, however, he can do so, see *per* Atkin, L.J., [1925] 1 K. B., at p. 157.

course of the lorry. She was informed by bystanders that a child answering to the description of one of hers had been injured. In consequence of her fright she suffered a nervous shock which caused her death. In an action by the plaintiff under the Fatal Accidents Act, it was held that he was entitled to recover although the shock to his wife was caused by fear, not for her own safety, but for that of her children.

In tort, moreover, there are many cases in which, from the nature of the wrong, or the manner in which it was done, the jury may award *vindictive or exemplary damages*. Thus, in an old case, where the defendant, after being requested not to do so, continued to trespass upon the plaintiff's land and endeavoured to join the plaintiff's shooting-party, and shot the plaintiff's birds, and used offensive language, it was held that the jury were justified in assessing damages at £500 (*p*). Vindictive damages are accordingly frequently awarded, not only for trespass, but in actions for assault, false imprisonment, malicious prosecution, seduction, libel, and slander.

Remoteness of damage.—In determining the extent of the consequences for which a defendant is liable in an action of tort, no question arises, as it does in cases of breach of contract, as to whether the damages were "probable," in the sense of being such as he ought to have contemplated (*q*). The only ground of remoteness is therefore the absence of sufficient causal connection between the tort and the damage (*r*). "In tort a defendant is liable for all the consequences of his illegal act where they are not so remote as to have no direct connection with the act" (*s*); "remoteness as a legal ground for the exclusion of damage in an action of tort means . . . the absence of direct and natural causal sequence" (*t*). "What a defendant ought to have contemplated as a reasonable man is material when the question is whether or not he was guilty of negligence—that is, want of due care—

(*p*) *Merest* v. *Harvey*, 5 Taunt. 231; 15 R. R. 548. "Where a wrongful act is accompanied by words of contumely and abuse the jury are warranted in taking that into their consideration" (*Bell* v. *Midland Railway Co.*, 10 C. B. (N.S.), at p. 308; 30 L. J. C. P. 273).

(*q*) *Ante*, pp. 200—202.

(*r*) *Ante*, p. 202.

(*s*) *Sneesby* v. *Lancashire and Yorkshire Railway*, L. R. 9 Q. B., at p. 268; affirmed, 1 Q. B. D. 42; 45 L. J. Q. B. 1; 33 L. T. 372.

(*t*) *Dulieu* v. *White*, [1901] 2 K. B., at p. 678; see *ante*, p. 203.

according to circumstances: *this, however, goes to culpability, not to compensation. . . . Remoteness of damage is a question of cause and effect*" (*u*).

A defendant is not liable for damages with which his wrongful act has no causal connection. Thus, in the case of *Glover* v. *London and South Western Railway*, the defendants wrongfully, but without unnecessary violence, removed the plaintiff from a railway carriage. The plaintiff brought an action for assault, and claimed as special damage the value of some race-glasses which he left in the carriage. There was, however, no evidence that the plaintiff was prevented from taking his glasses with him, and it was therefore held that this damage was too remote, not being due to any act of the defendants, but to the plaintiff's own negligence (*x*). But if there is a continuing causal connection between his wrongful act and the damage the defendant will be liable although the damage would not have resulted but for some intervening circumstances (*y*), or even the act of a third person.

(*u*) *Per* Lord Sumner, in *Weld-Blundell* v. *Stephens*, [1920] A. C., at pp. 984, 988; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640; approving *Blyth* v. *Birmingham Waterworks*, 11 Ex. 781; and the judgment of Blackburn, J., in *Smith* v. *London and South Western Railway*, L. R. 6 C. P., at p. 21; 40 L. J. C. P. 21; 23 L. T. 678. In the last-mentioned case, Channell, B., said: "I quite agree that . . . the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not . . . but when once it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not." Blackburn, J., said: "I also agree that what the defendants might reasonably anticipate is . . . only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence." See also the judgment of Scrutton, L.J., in *Re Polemis and Furness, Withy & Co.*, [1921] 3 K. B., at p. 575; 90 L. J. K. B. 1353; 37 T. L. R. 940, where the same rule is repeated and disapproval is expressed of the common expression "natural and probable result."

(*x*) L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; 17 L. T. 139. But it would have been otherwise if a watch or purse had been forcibly shaken from the plaintiff's person and so lost (*id.*). Compare *Hambrook* v. *Stokes* (*ante*, p. 509), in which it was held that in order to enable the plaintiff to succeed the shock must have been due to his wife's sight or sound of the accident and consequent apprehension of danger to her child and not solely to the information given by the bystanders.

(*y*) See *Sneesby* v. *Lancashire and Yorkshire Railway* (*ante*, pp. 203, 510). Compare *Harris* v. *Mobbs*, 3 Ex. D. 268; 39 L. T. 164. Here the proprietor of a ploughing apparatus left it by the side of the road. The plaintiff's mare shied at it, galloped kicking for 140 yards, got her leg over the shaft and fell, kicking the driver. In an action under the Fatal Accidents Act it was held that the van proprietor was liable. "Though the immediate cause of the accident was the kicking of the mare, still the unauthorised and dangerous

Thus in the case of *Scott* v. *Shepherd* (*z*) the defendant threw a lighted squib into a market-house, where it fell upon the stand of one Yates. One Willis, to prevent injury to himself and the wares of Yates, threw the squib across the market-house, where it fell upon the stand of one Ryal, who in turn, in order to save himself and his wares, picked it up and threw it away, but hit the plaintiff and put out one of his eyes. It was held that the defendant, having given the first mischievous impulse to the squib, was answerable for all the consequential damages. "If a man turns out a mad bull, ox, or any other wild or mischievous beast towards A, who turns the brute towards B, who turns it again towards C, whom he hurts, he who was the first actor and turned out the beast is answerable in trespass *vi et armis* for the injury" (*a*). If, however, the damage was caused by the "conscious act of another volition" (*b*), not induced by the act of the defendant, it is too remote to be recoverable, although it could not have happened but for his original wrongful act. Thus, in the case of *Weld-Blundell* v. *Stephens* (*c*), A, having employed B to investigate the affairs of a company, wrote to B a letter containing libellous statements concerning two officials of the company. B handed the letter to his partner, who accidentally dropped it at the company's office; the manager of the company picked it up and showed it to the two officials, who brought actions for libel against A and recovered damages. A then brought an action against B, in which he claimed to recover the amount of such damages; but it was held that this damage was too remote to be recoverable, the negligence of B having been merely an occasion and not the cause of the act of the manager (*d*).

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appearance of the van and plough on the side of the road was . . . the proximate cause of the accident."

(*z*) (1773), 2 W. Bl. 892.

(*a*) *Id.*

(*b*) *Dominion Natural Gas Co.* v. *Collins & Perkins*, [1909] A. C., at p. 646; 101 L. T. 359; 25 T. L. R. 831.

(*c*) [1920] A. C. 956; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640.

(*d*) [1920] A. C., at p. 981. The act of the manager was a *novus actus interveniens;* compare *Harnett* v. *Bond*, [1924] 2 K. B. 517; 93 L. J. K. B. 946; 131 L. T. 782; 40 T. L. R. 653, where it was held that A, who had without sufficient care taken action by which the plaintiff was improperly detained as a lunatic, was not responsible for his subsequent detention in various institutions by B, C, and D, whose duty it was to decide whether his detention was necessary, and who had in fact on various occasions formed

2. **Injunctions.**—The remedy of an injunction was formerly granted only by Courts of Equity; it may now be granted by any Division of the High Court, though the equitable principles which formerly governed its grant will still be followed. The chief of these principles is that, being a discretionary remedy, it will not be granted where damages are a sufficient remedy (*e*).

If an infringement of a legal right has been established the plaintiff, in the absence of any special circumstances, is entitled to an injunction to prevent its repetition, provided that damages cannot sufficiently indemnify him (*f*), as, *e.g.*, in the case of a continuing nuisance (*g*). An injunction may also be granted to restrain a threatened injury. And, in all cases in which the Court may grant an injunction, it may award damages either in addition to or in substitution for such injunction. Accordingly, it may award damages for an injury that is merely threatened (*h*). But an injunction will not be granted in the case of a trivial or occasional nuisance (*i*), or a trivial trespass where no material damage is caused and there is no danger that the defendant may by prescription acquire any right against the plaintiff (*k*). It has been laid down as a general rule that an injunction will not be granted (i) " if the injury to the plaintiff's rights is small; (ii) and is one which is capable of being estimated in money; (iii) and is one which can be adequately compensated by a small money pay-

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decisions that it was necessary, with the result that each decision was a *novus actus interveniens*. There are certain cases (see [1920] A. C., at p. 985) in which a defendant is liable even for the independent acts of third persons, as, *e.g.*, where he exposes to the interference of others a thing which is in itself dangerous. In such cases, however, his liability arises from the breach of the special duty not to expose dangerous things so as to enable strangers to make them a source of injury to persons brought into contact with them. The question of remoteness of damage does not therefore arise, because the special duty increases the original *liability* of the defendant and makes him responsible for the acts of strangers as if they were his own acts (*post*, Chapter III).

(*e*) *London and Blackwall Railway* v. *Cross*, 31 Ch. D., at p. 369; 55 L. J. Ch. 313; 54 L. T. 309.

(*f*) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch., at pp. 310, 322; 64 L. J. Ch. 216; 72 L. T. 34.

(*g*) *Goodson* v. *Richardson*, 9 Ch. 221; 43 L. J. Ch. 790; 30 L. T. 142.

(*h*) *Leeds, etc., Society* v. *Slack*, [1924] A. C. 851; 93 L. J. Ch. 436; 131 L. T. 710; 40 T. L. R. 745.

(*i*) *Shelfer* v. *City of London Electric Lighting Co.* (*ubi supra*).

(*k*) *Behrens* v. *Richards*, [1905] 2 Ch. 614; 74 L. J. Ch. 615; 93 L. T. 623; 21 T. L. R. 705.

ment; (iv) and the case is one in which it would be oppressive to the defendant to grant an injunction " (*l*).

3. **The Fatal Accidents Act, 1846** (Lord Campbell's Act).—At Common Law the death of a human being cannot be complained of in a civil Court as an injury (*m*). Thus a master cannot maintain an action for injuries which cause the death of his servant, and a father cannot maintain an action for the funeral expenses of a child whose death was caused by the negligence of the defendant (*n*). But, by *Lord Campbell's Act*, 1846 (*o*), a right to *compensation* was given to the families of persons killed by torts. This Act does not merely remove the operation of the maxim *Actio personalis moritur cum persona*, but it gives a new cause of action beyond that which the deceased would have had if he had survived, and based on a different principle (*p*).

By s. 1 of the Act: " Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a

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(*l*) *Shelfer* v. *City of London Electric Lighting Co.* (*ubi supra*), approved in *Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 212; 73 L. J. Ch. 484; 90 L. T. 687; 20 T. L. R. 475. See also *Slack* v. *Leeds, etc., Society*, [1924] 2 Ch. 475; 94 L. J. Ch. 46.

(*m*) For a full explanation, see *Admiralty Commissioners* v. *S.S. Amerika*, [1917] A. C. 38; 86 L. J. P. 58; 116 L. T. 34; 33 T. L. R. 135.

(*n*) *Clark* v. *London General Omnibus Co.*, [1906] 2 K. B. 648; 75 L. J. K. B. 907; 95 L. T. 435; 22 T. L. R. 691. But this rule does not apply where there is a cause of action independently of the wrong causing the death, such as a breach of contract, and where the damage arising from the death is merely one of the elements of damage. Thus, where tinned salmon sold to the plaintiff was not fit for human food and caused the death of his wife, it was held, in an action brought by him for breach of the warranty implied by s. 14 (1) of the Sale of Goods Act, 1893, that he was entitled to claim (*inter alia*) for the loss of his wife's services (*Jackson* v. *Watson*, [1909] 2 K. B. 193; 78 L. J. K. B. 587; 100 L. T. 799; 25 T. L. R. 454).

(*o*) 9 & 10 Vict. c. 93. See also the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1925, which will be dealt with later.

(*p*) See *British Electric Railway Co.* v. *Gentile*, [1914] A. C., at p. 1040; 83 L. J. P. C. 353; 30 T. L. R. 594

felony" (*q*). By s. 2: "Every such action shall be for the benefit of the wife, husband, parent (which term is to include father, mother, grandfather, grandmother, stepfather, stepmother (*r*)), and child (which term is to include son, daughter, grandson, granddaughter, stepson, and stepdaughter (*r*)) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct." By s. 3, it is provided that "not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death" (*s*). By s. 4, the plaintiff must deliver to the defendant, or his solicitor, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

By s. 1 of the *Fatal Accidents Act*, 1864, if there is no executor or administrator of the deceased, or if the action is not brought by such executor or administrator within six calendar months after the death, then it may be brought in the name or names of all or any of the persons for whose benefit the executor or administrator would have sued (*t*).

Although, however, there is a new cause of action, yet no

(*q*) The Act has been held to apply to a foreigner, as against an English wrongdoer—*e.g.*, a Norwegian sailor killed by a collision between a foreign and a British ship on the high seas (*Davidsson* v. *Hill*, [1901] 2 K. B. 606; 70 L. J. K. B. 788; 85 L. T. 118; 17 T. L. R. 614).

(*r*) S. 5. The Act does not include an illegitimate child (*Dickinson* v. *North Eastern Railway*, 33 L. J. Ex. 91).

(*s*) If against a ship or its owners, the action can now be brought within two years, by s. 8 of the Maritime Conventions Act, 1911: see *The Caliph*, [1912] P. 213; 82 L. J. P. 27.

(*t*) It has been held that an action can, under this provision, be maintained by any of such persons, though brought within six calendar months of the death, if there be at the time no executor or administrator of the deceased (*Holleran* v. *Bagnell*, 4 L. R. Ir. 740).

action can be maintained unless the deceased at the moment of death could have successfully maintained an action. No action can therefore be brought if the defendant, by the terms of some special contract, was exempted from liability (*u*), or if the deceased had already brought an action and recovered damages, or his right of action had been discharged by the receipt of some compensation in satisfaction thereof, or by the expiry of a period of limitation (*x*), as, *e.g.*, in cases within the Public Authorities Protection Act, 1893, at the end of six months from the date of the wrong (*y*). But the *amount* of damages recoverable by the dependants of the deceased is not estimated on the same basis as the amount of damages which might have been recovered by the deceased. Accordingly, where a passenger by railway is travelling with a ticket by which the liability of the railway company is limited to a certain amount, and is killed by the negligence of the company's servants, the damages recoverable by his dependants are not limited to that amount (*z*).

Assessment of damages.—The damage "should be calculated in reference to a reasonable expectation of pecuniary benefit, *as of right or otherwise*, from the continuance of the life" (*a*). "All that is necessary is that a reasonable expectation of pecuniary benefit should be entertained by the person who sues": a father may, therefore, recover damages for the death of his daughter without showing that she had ever yet contributed to his support

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(*u*) *Haigh* v. *Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 640; 49 L. T. 802 (special contract between a steamship company and a passenger, exempting the former from liability for injuries caused by the negligence of its servants).

(*x*) *British Electric Railway Co.* v. *Gentile* (*ubi supra*).

(*y*) *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804; 74 L. J. K. B. 481; 92 L. T. 44; 21 T. L. R. 397. As to the Act, see *ante*, p. 506. But, since the cause of action under Lord Campbell's Act is a new cause of action, if, in cases within the Public Authorities Protection Act, the period of six months had not elapsed at the death of the deceased, so that he had not then forfeited his right of action, the latter Act does not apply so as to bar an action unless brought within six months from the date of the wrong (*British Electric Railway Co.* v. *Gentile* (*ubi supra*); *Venn* v. *Tedesco*, [1926] 2 K. B. 227; 95 L. J. K. B. 866; 135 L. T. 108; 42 T. L. R. 478).

(*z*) *Nunan* v. *Southern Railway Co.*, [1924] 1 K. B. 223; 93 L. J. K. B. 140; 130 L. T. 131; 40 T. L. R. 21.

(*a*) *Franklin* v. *South Eastern Railway*, 117 R. R. 658; 3 H. & N. 211. See also the summary of the existing decisions by Scrutton, L.J., in *Baker* v. *Dagleish, etc., Co.* (*infra*). It is not sufficient, however, to prove a mere speculative possibility of pecuniary benefit (*Barnett* v. *Cohen*, [1921] 2 K. B. 461; 90 L. J. K. B. 1307; 37 T. L. R. 629: father claiming in respect of the death of a son of five years of age).

or had even begun to earn any wages (*b*). But if a man has no means of his own and does not earn his own living, it is obvious that his wife and children cannot be pecuniary losers by his death (*c*). Only pecuniary loss can be taken into consideration by the jury, not the grief or mental sufferings of the family (*d*). And funeral expenses and the cost of mourning are not pecuniary loss (*e*). But pecuniary loss is not limited to the value of money lost, or the money value of things lost, as contributions of food or clothing, but includes the monetary loss incurred by replacing services rendered gratuitously by a relative, if there was a reasonable prospect of them being rendered freely in the future but for the death (*f*).

It was formerly held that if the deceased was insured the jury, in assessing damages, must take into account the amount of the policy, but now, by s. 1 of the *Fatal Accidents Act*, 1908, it is provided that the jury must not take into account "any sum paid or payable on the death of the deceased under any contract of assurance or insurance." But, as a general rule, the fact that the plaintiff is, in consequence of the death, in receipt of a pension from the Crown, ought to be taken into consideration, although the grant or continuance of the pension is entirely in the discretion of the Crown, and it is not paid under any legal obligation (*g*).

SECTION 2.—LIABILITY FOR TORTS OF OTHERS.

Husband and Wife.—For a wife's *ante-nuptial* torts, her husband, by the *Married Women's Property Act*, 1882, is liable

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(*b*) *Taff Vale Railway* v. *Jenkins*, [1913] A. C., at p. 7; 82 L. J. K. B. 49; 29 T. L. R. 19.

(*c*) *Grand Trunk Railway of Canada* v. *Jennings*, 13 A. C., at p. 804; 58 L. J. P. C. 1; 59 L. T. 679.

(*d*) *Blake* v. *Midland Railway*, 18 Q. B. 93; 21 L. J. Q. B. 233; 88 R. R. 543.

(*e*) *Dalton* v. *South Eastern Railway*, 27 L. J. C. P. 227; 4 C. B. (N.S.) 296; *Clark* v. *London General Omnibus Co.*, *ante*, p. 514, note (*n*).

(*f*) *Berry* v. *Humm & Co.*, [1915] 1 K. B. 627; 84 L. J. K. B. 918; 31 T. L. R. 198. Held that the plaintiff could recover the cost of employing a housekeeper and of extra expenses of management of his household occasioned by the loss of the services of his wife.

(*g*) *Baker* v. *Dalgleish Steam Shipping Co.*, [1922] 1 K. B. 361; 91 L. J. K. B. 392; 126 L. T. 482; 38 T. L. R. 245. Where, however, the pension is recovered under the Navy Pay and Pensions Order, 1920, the Minister of Pensions has power to reduce the pension by the amount of damages awarded in the action and the probability of his doing this must also be taken into account (*Id.*, and see *Carling* v. *Lebbon*, [1927] W. N. 123).

to the extent of any property which he has acquired or to which he has become entitled through her, and may be sued either alone or jointly with her; but as between himself and her, unless there is any contract between them to the contrary, he is entitled to be indemnified out of her separate property (*h*). For a wife's *post-nuptial* torts her husband is liable jointly with her, and judgment may be enforced against him or against her separate property if she has any (*i*).

A husband is not, however, liable for a tort by his wife which is directly connected with a contract made by her, and is the means of effecting it and parcel of the same transaction, or which consists of a breach of duty arising out of contract. Thus, where a married woman, by fraudulently representing to the plaintiffs that she had been asked by her husband to request them to lend him a sum of money for certain specific objects, obtained from them a loan which she spent for her own purposes. Her husband had given her no authority to borrow or to make any representation. In an action against the husband and wife for the fraud of the wife it was held that the husband was not liable. The wife got the money for herself by means of the representation that she was borrowing for her husband; the fraud, therefore, was directly connected with the contract and was the means of effecting it, the whole thing being one and the same transaction (*k*). So also, where a chauffeur, employed by a married woman, was injured by the defective condition of her garage, it was held that her husband was not liable, since the tort arose out of the contract of employment (*l*). But where a married woman made a contract with the plaintiff, under which, on the happening of a certain event, money would be payable to her by the plaintiff, and by a fraudulent

(*h*) 45 & 46 Vict. c. 75, ss. 13—15. See *Beck* v. *Pierce*, 23 Q. B. D., at p. 321; 58 L. J. Q. B. 516; 61 L. T. 448. The wife may also be sued alone: s. 13.

(*i*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; 55 L. J. Q. B. 375; 54 L. T. 649; *Earle* v. *Kingscote*, [1900] 1 Ch. 203; 69 L. J. Ch. 725; 83 L. T. 377; *Edwards* v. *Porter*, [1925] A. C. 1; 94 L. J. K. B. 65; 132 L. T. 496; 41 T. L. R. 57. She may also be sued alone: s. 1 (2) (see *ante*, p. 148).

(*k*) *Edwards* v. *Porter* (*ubi supra*), reviewing the authorities and explaining s. 1 (2) of the Married Women's Property Act, 1882. See also *McNeale* v. *Hawes*, [1923] 3 K. B. 538; 92 L. J. K. B. 720; 129 L. T. 170; 39 T. L. R. 358.

(*l*) *Cole* v. *De Trafford*, [1917] 1 K. B. 911; 86 L. J. K. B. 764; 117 L. T. 224; 33 T. L. R. 241; and see *Liverpool Adelphi Loan Association* v. *Fairhurst* (*ante*, p. 148).

representation that the event had happened, induced the plaintiff to pay her the money, it was held that the fraud was separate from the contract, and that the defendant's husband was liable (*m*).

The liability of the husband is terminated at any time before judgment (i) by the death of the wife (*n*); (ii) by divorce (*o*) or judicial separation (*p*). But it does not cease merely because he is living apart from his wife under a separation agreement (*q*).

Master and Servant. Principal and Agent.—A master or principal is liable for the torts of his servant or agent—

1. When they are the consequences of his own specific orders (*r*).
2. When they are ratified by him (*s*), provided (i) that the act was done by a person who professed to act as his servant or agent (*t*); and (ii) that his ratification was with full knowledge of the nature of the act or with intent to take upon himself, without enquiry, the risk of any irregularity that may have been committed (*u*).
3. When they are committed "in the course of his employment," or "within the scope of his authority" (*x*).

In the last class of cases, the liability of the master or principal depends upon the principle that "a person who puts another in his place to do a *class of acts* in his absence, necessarily leaves

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(*m*) *Earle* v. *Kingscote* (*ubi supra*); and see *Wright* v. *Leonard*, 11 C. B. (N.S.) 258; 30 L. J. C. P. 368; 132 R. R. 554.

(*n*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; 78 L. J. K. B. 695; 100 L. T. 675; 25 T. L. R. 374.

(*o*) *Capel* v. *Powell*, 17 C. B. (N.S.) 743; 34 L. J. C. P. 168; 142 R. R. 609. Divorce is not complete until the decree is made absolute (*Sinclair* v. *Fell*, [1913] 1 Ch., at p. 161; 82 L. J. Ch. 105; 108 L. T. 152; 29 T. L. R. 103).

(*p*) Matrimonial Causes Act, 1857, s. 26; *Cuenod* v. *Leslie* (*ubi supra*); *Edwards* v. *Porter* (*ubi supra*), [1925] A. C., at p. 39. A separation order under the Summary Jurisdiction (Married Women) Act, 1895, has the same effect as a decree of judicial separation: see s. 5 (a).

(*q*) *Head* v. *Briscoe*, 5 C. & P. 484; 38 R. R. 841; *Utley* v. *Mitre Publishing Co.*, 17 T. L. R. 720.

(*r*) *Gregory* v. *Piper*, 5 B. & C. 591; 33 R. R. 268.

(*s*) *Hilberry* v. *Hatton*, 2 H. & C. 822; 33 L. J. Ex. 190; 133 R. R. 811.

(*t*) *Wilson* v. *Tumman*, 6 Man. & G. 236; 12 L. J. C. P. 306.

(*u*) *Freeman* v. *Rosher*, 13 Q. B. 780; 18 L. J. Q. B. 340; *Lewis* v. *Read*, 13 M. & W. 234; 14 L. J. Ex. 295; 67 R. R. 828.

(*x*) These two expressions have exactly the same meaning (*Dyer* v. *Munday*, [1895] 1 Q. B., at p. 748; 64 L. J. Q. B. 448; 72 L. T. 448).

him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant but in the course of the employment" (*y*). Whether it was done in the course of the employment is a question of fact (*z*).

But, in order to render liable the master or principal, it is not necessary that the act done by the servant or agent should be one of a class which he is *expressly* authorised to do. Thus, in case of emergency any servant has implied authority to take reasonable steps to protect his master's property. So, when a carter in the employment of the defendants was walking home to his dinner and thought he saw a boy stealing sugar from a waggon that was being driven by one of his employers along the street in which he was walking, and in consequence struck the boy and caused him to fall under the wheels of the waggon, it was held that the employers were liable although the carter was not at the time employed to do any work connected with the waggon (*a*).

Accordingly, where an act done by a servant or agent is one of a class of acts which he was authorised or employed to do, the master or principal is liable (i) for the negligence of the servant or agent in the course of his employment; (ii) for excess or mistake by the servant or agent in the execution of his duty; and (iii) for a wilful wrong committed by the servant or agent in the course of his employment.

(*y*) *Bayley* v. *Manchester, etc., Railway*, L. R. 7 C. P., at p. 420; 41 L. J. C. P. 278; *Percy* v. *Glasgow Corporation*, [1922] 2 A. C., at p. 307; 91 L. J. P. C. 187; 127 L. T. 501; 38 T. L. R. 722. It should, however, be noticed that A may be liable as principal for the acts of B even though there is no actual employment of B as servant or agent, but merely a "casual delegation" of authority as, *e.g.*, where the owner of a vehicle, without giving up his right to control it, allows it to be driven by a friend, see *Pratt* v. *Patrick*, [1924] 1 K. B. 488; 93 L. J. K. B. 174; 130 L. T. 735; 40 T. L. R. 227; *Parker* v. *Miller*, 42 T. L. R. 408.

(*z*) *Hutchins* v. *London County Council*, 114 L. T. 377; 85 L. J. K. B. 1177; 32 T. L. R. 179; *Joseph Rand, Ltd.* v. *Craig*, [1919] 1 Ch. 1; 88 L. J. Ch. 45; 119 L. T. 751.

(*a*) *Poland* v. *Parr & Sons*, [1927] 1 K. B. 236; 96 L. J. K. B. 152.

(i) *Negligence of servant.*—Thus, in *Whatman* v. *Pearson*, a carter employed by the defendant was given an hour for dinner, but was not permitted to go home to dine or to leave his horse and cart. In disobedience to his orders he went home, and left his horse unattended in the street before his door. The horse having run away and injured the plaintiff's property, it was held that it was properly left to the jury to say whether the carter was acting "within the general scope of his authority to conduct the horse and cart during the day" (*b*). So also in *Abraham* v. *Bullock* (*c*), the defendant was a job-master, from whom a carriage with a horse and driver was hired for the conveyance of the plaintiff's traveller with samples of jewellery to be shown to customers. The driver negligently left the carriage unattended while the traveller was at lunch, and so gave an opportunity to thieves to steal its contents. It was held that the negligence of the driver was committed within the course of his employment, and was therefore negligence for which the defendant was responsible. So also where the defendants, a firm of motor engineers, employed in a garage a youth who, while drawing motor spirit from a drum into a tin, lit a match and threw it on the ground, as a result of which the spirit caught fire and the garage was burnt down, it was held that they were liable for the negligent act of their servant in the course of his employment (*d*).

(ii) *Excess or mistake in execution of duty.*—"If an agent of any person or corporation does a thing which is within the scope of his authority, even though he misuses that authority, his principal is liable for what he does" (*e*). Thus, where a railway porter, having authority to remove a person from a wrong carriage, misused that authority by violently pulling the plaintiff out of the right carriage, it was held that the railway company was liable, since the porter was acting within the scope of his

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(*b*) L. R. 3 C. P. 422; 37 L. J. C. P. 156. Compare *Engelhart* v. *Farrant & Co.*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617.

(*c*) 86 L. T. 796; 18 T. L. R. 701, as explained in *Cheshire* v. *Bailey* (*post*, p. 523, note (*r*)).

(*d*) *Jefferson* v. *Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281; 90 L. J. K. B. 1361; 124 L. T. 775.

(*e*) *Hutchins* v. *London County Council*, 114 L. T., at p. 378; 32 T. L. R. 179.

employment, "however much he may have abused his authority, however improperly and blunderingly he may have acted" (*f*).

On the other hand, the principal is not liable for any gratuitous assault or for any acts of mere caprice on the part of the agent (*g*). Thus, in *Hutchins* v. *London County Council* (*h*) a passenger on a tramcar had a trivial altercation with the conductor, who thereupon, while he was taking from his pocket the money to pay his fare, threw him into the road. Under the by-laws the conductor had power to eject a passenger for certain offences, *e.g.*, disorderly conduct or refusal to pay the fare. It was held that it was for the jury to determine whether the conductor was acting from mere caprice, or within the scope of his authority believing that an offence had been committed.

(iii) *Wilful wrong in the course of employment.*—Thus in *Limpus* v. *London General Omnibus Co.* (*i*) the driver of the defendants' omnibus, with the view of overtaking the plaintiff's omnibus, drove across it, and in so doing caused it damage; the defendants were held liable, although they had given express instructions to their drivers not to race with or obstruct any other omnibus. And the master may be responsible even though the wrong of the servant consitutes a criminal offence. Thus in the case of *Dyer* v. *Munday*, the defendant, who sold furniture on the hire purchase system, was held liable for an assault committed by his manager in the course of removing from the plaintiff's house some furniture on which some instalments of payment were in arrear (*k*). But the employer is not liable if the wrong is committed by the servant to gratify some private spite or to effect some purpose of his own (*l*). If, however, a fraud

(*f*) *Bayley* v. *Manchester, etc., Railway*, 8 C. P. D. 148; 42 L. J. C. P. 78; 28 L. T. 366. The excess may, however, be so great as to take the act out of the class of acts which the servant or agent is authorised or employed to do. Whether it is so or not is a question of degree (*Poland* v. *Parr & Sons*, [1927] 1 K. B. 236; 96 L. J. K. B. 152).

(*g*) *Hutchins* v. *London County Council* (*ubi supra*); *Percy* v. *Glasgow Corporation* (*ubi supra*).

(*h*) *Ubi supra.*

(*i*) 1 H. & C. 526; 32 L. J. Ex. 34; 7 L. T. 641.

(*k*) [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448. See also *Goh Choon Seng* v. *Lee Kim So*, [1925] A. C. 550; 94 L. J. P. C. 129; 133 L. T. 65, where a master was held liable for an unauthorised trespass committed by his servants in the course of doing work which they were employed to do.

(*l*) *Croft* v. *Alison*, 4 B. & Ald. 590; 23 R. R. 407; *Joseph Rand, Ltd.*

is committed by an agent in the course of his employment, the principal is not relieved from responsibility by reason of the fact that the agent did not mean to benefit his principal by the fraud, but to benefit himself (*m*).

But a master is not liable "for the acts of persons who are not his servants in respect of [the] particular acts—that is, who are not acting within the scope of their employment in doing these acts." . . . If the servant, in doing any act, breaks the connection of service between himself and his master, the act done under those circumstances is not the act of the master (*n*). Thus, in *Sanderson* v. *Collins* (*o*), the defendant was the bailee of a carriage, which without his knowledge was taken out by his coachman on a frolic of his own and injured in a collision. It was held that as the coachman was not acting in the course of his employment, the defendant was not liable. So also an omnibus proprietor is not liable for damage caused through its being negligently driven by the *conductor* unless there is evidence that the latter had some special authority to drive (*p*). On the same principle, in a case where the facts were the same as in *Abraham* v. *Bullock* (*q*), except that the defendant's servant, by arrangement with confederates, drove the vehicle to a place where its contents were stolen, it was held that the defendant was not liable, because the servant, by his criminal act, had severed the connection of service, and had ceased to be acting within the scope of his employment (*r*).

And a servant can have no authority to do what his employer

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v. *Craig*, [1919] 1 Ch. 1; 88 L. J. Ch. 45; 119 L. T. 751; *Hutchins* v. *London County Council* (*ubi supra*).

(*m*) *Lloyd* v. *Grace, Smith & Co.*, [1912] A. C. 716; 81 L. J. K. B. 1140; 28 T. L. R. 547, explaining *Barwick* v. *English Joint Stock Bank*, L. R. 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461.

(*n*) *Sanderson* v. *Collins*, [1904] 1 K. B., at pp. 631, 632; 73 L. J. K. B. 358.

(*o*) [1904] 1 K. B. 628; 73 L. J. K. B. 358; 90 L. T. 243; 20 T. L. R. 249. Other "independent frolic" cases are—*Mitchell* v. *Crasweller*, 13 C. B. 237; 22 L. J. C. P. 100; *Storey* v. *Ashton*, L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Rayner* v. *Mitchell*, 2 C. P. D. 357.

(*p*) *Beard* v. *London General Omnibus Co.*, [1900] 2 Q. B. 530; 69 L. J Q. B. 895; 83 L. T. 362. Compare *Ricketts* v. *Tilling* (*infra*).

(*q*) *Ante*, p. 521.

(*r*) *Cheshire* v. *Bailey*, [1905] 1 K. B. 237; 74 L. J. K. B. 176; 92 L. T. 142; 21 T. L. R. 130, followed in *Mentz* v. *Silverton*, 36 T. L. R. 399.

has no *power* to do (*s*). Thus, the servant of a railway company cannot have authority to arrest a passenger for an offence in respect of which the company itself had no power to arrest him (*t*). It may be noted that, as a general rule, a servant has implied authority to give a person into custody only where it is necessary to do so in order to protect the master's property, or where the duty which he is employed to discharge cannot be efficiently performed unless he has the power to apprehend offenders promptly on the spot (*u*). Thus, in the case of *Abrahams* v. *Deakin*, the plaintiff went into the defendant's public-house and paid a foreign coin in mistake for a half-sovereign. The barman followed him into the street, and gave him into custody on a charge of attempting to pass bad money. It was held that the barman had no implied authority to arrest the plaintiff, his master's property no longer being in danger and the arrest being for the purpose only of punishing the plaintiff (*x*).

Delegation of duty by servant or agent.—A servant or agent has in general no implied authority to delegate to any other person the performance of his duties unless some circumstances exist which give him authority to do so as an agent of necessity on behalf of his master (*y*). But though the master is not liable for the acts of the person to whom the servant has improperly delegated his duties, he may be liable for damage caused by the negligence of his servant in allowing another person to perform his duties. Thus, in *Ricketts* v. *Thomas Tilling, Ltd.*, the driver of an omnibus negligently allowed the conductor to drive, and sat by him while he was driving. Through the careless driving

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(*s*) See *Percy* v. *Glasgow Corporation*, [1922] 2 A. C., at p. 312; 91 L. J. K. B. 187.

(*t*) *Poulton* v. *London and South Western Railway*, L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; 17 L. T. 11; *Ormiston* v. *Great Western Railway*, [1917] 1 K. B. 598; 86 L. J. K. B. 759; 116 L. T. 479; 33 T. L. R. 471.

(*u*) See *Hanson* v. *Waller*, [1901] 1 Q. B. 390; 70 L. J. Q. B. 231; 84 L. T. 91; 17 T. L. R. 162, reviewing earlier authorities.

(*x*) [1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690. See also *Radley* v. *London County Council*, 109 L. T. 162; 29 T. L. R. 680. (Here a tram conductor, having authority to enforce a by-law which prohibited riding on the steps of the trams, left the tramcar in order to punish a boy, who, as he erroneously thought, had been riding on the steps. *Held*, that the tramway company was not liable.)

(*y*) *Gwilliam* v. *Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579, and see *ante*, pp. 214, 228.

of the conductor the plaintiff was injured. It was held that the defendants were liable, the cause of the injuries to the plaintiff being the negligent discharge of his duty by the driver (*z*). And a master can delegate his authority; if, therefore, a master directs his servants to take orders from his manager, the orders of his manager become his orders, and acts done by his servants in accordance with those orders are done within the course of their employment in carrying out their master's directions, even though the orders are such as the manager had no authority to give (*a*).

Liability for Acts of an Independent Contractor and His Servants.—The liability of one person for the acts of another as his servant or agent depends upon his being the *employer* of that other person, *i.e.*, upon his having "a right, at the moment, to control the doing of the act" (*b*). "In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself or to the first person in the ascending line who is the employer and has control of the work. You cannot go farther back and make the employer of that person liable" (*c*).

If, therefore, a person employs a contractor, carrying on an independent business, to carry out lawful work for him, the end only being prescribed and the means of carrying it out being left to the contractor, he is not responsible for the casual acts of the contractor's servants in the course of their employment by the contractor (*d*). Thus, in the case of *Reedie* v. *London and North Western Railway*, the defendants employed a contractor to build a bridge. During the building operations the contractor's workmen caused the death of a person passing under the bridge, by negligently allowing a stone to fall upon him. It was held that

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(*z*) [1915] 1 K. B. 644; 84 L. J. K. B. 342; 112 L. T. 137; 31 T. L. R. 17, distinguishing *Beard* v. *London General Omnibus Co.* (*ante*, p. 523), on the ground that in the former case the driving of the omnibus by the conductor was not due to any negligent delegation of his duties by the driver.

(*a*) *Irwin* v. *Waterloo Taxi-Cab Co., Ltd.*, [1912] 3 K. B. 588; 81 L. J. K. B. 998; 107 L. T. 288; 28 T. L. R. 567.

(*b*) *Donovan* v. *Laing, etc., Syndicate*, [1893] 1 Q. B., at p. 634; 63 L. J. Q. B. 25; 68 L. T. 512.

(*c*) *Murray* v. *Currie*, L. R. 6 C. P., at p. 27; 40 L. J. C. P. 26; 23 L. T. 357.

(*d*) *Donovan* v. *Laing, etc., Syndicate* (*ubi supra*); *Pickard* v. *Smith*, 10 C. B. (N.S.), at p. 480; 128 R. R. 790.

the defendants were not liable, although by the contract they had the power of dismissing incompetent workmen (*e*).

But, even where a person employs an independent contractor, he may be liable in the following circumstances:—

1. Where he personally directs or assents to the doing of the particular act (*f*);

2. Where the work for which the contractor is employed is itself wrongful, as, *e.g.*, an improper obstruction of a highway (*g*);

3. Where he is under a Common Law or statutory obligation to see that the work is executed properly and without causing danger to others, and damage arises through the improper execution of the work by the contractor. Thus at Common Law, whenever a man orders work to be executed, from which injurious consequences to others may arise unless precautions are taken, it is his duty to take precautions to avoid those consequences, and he cannot escape responsibility by delegating the performance of that duty to a contractor (*h*).

(*e*) 4 Ex. 244; 20 L. J. Ex. 65. See also *Padbury* v. *Holliday & Greenwood, Ltd.*, 28 T. L. R. 494.

(*f*) *McLaughlin* v. *Pryor*, 4 Man. & G. 48; 11 L. J. C. P. 169; 61 R. R. 455; *Burgess* v. *Gray*, 1 C. B. 578; 14 L. J. C. P. 184; 68 R. R. 769.

(*g*) *Ellis* v. *Sheffield Gas Co.*, 2 E. & B. 767; 23 L. J. Q. B. 42.

(*h*) See *Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335; 65 L. J. Q. B. 163; 74 L. T. 69, where the earlier authorities are reviewed and the distinction is explained between this class of cases and those in which, as in *Reedie* v. *London and North Western Railway* (*ubi supra*), the person employing the contractor is not liable for the casual or "collateral" negligence of the latter's servants. Two earlier cases in which the rule was formulated are those of *Pickard* v. *Smith* (10 C. B. (N.S.) 470; 4 L. T. 470) and *Tarry* v. *Ashton* (1 Q. B. D. 314; 45 L. J. Q. B. 260; 34 L. T. 97). In the first case, the servants of a coal merchant, while delivering coal into the defendant's cellar, left unguarded the open trapdoor of the cellar, through which the plaintiff fell. *Held*, that the defendant was liable because he was under a duty to take precautions to avoid mischief, and the fact that he entrusted this duty to the coal merchant's servants afforded him no defence. In the second case, the defendant was the occupier and lessee of a house from which a large lamp was suspended over the pavement. This lamp being out of repair, fell upon the plaintiff. It was held that the defendant ought to have kept the lamp in a safe condition so as not to become a nuisance, and that he was therefore liable, although shortly before the accident he had employed a contractor to repair it. A subsequent illustration occurs in *Penny* v. *Wimbledon Urban Council* ([1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615), where the defendants, having employed a contractor to make up a highway, were held liable for damage caused by a heap of earth which, in the course of doing the work, the contractor's servants had left unfenced and unlighted upon the highway, such damage resulting not from "mere casual or collateral acts of negligence, such as . . . a workman negligently leaving a pickaxe, or such like, on the road," but from failure to take precautions in the doing of the work which had to be done. See also *Holliday* v. *National*

Servants lent.—A contractor, instead of retaining control of the work, may place his servants under the control of the person employing him, so that they become the latter's servants for the purposes of some particular operation. Thus, in the case of *Donovan* v. *Laing, etc., Syndicate*, the defendants lent to X a crane, with the man in charge of it, for the purpose of loading a ship. The man received from X all instructions as to the working of the crane, the defendants having no control over the loading. The plaintiff having been injured through the negligent manner in which the man worked the crane, it was held that the defendants were not liable, as they had parted with the power of controlling the operation on which the man was engaged; it was also held that, in such a case, it makes no difference whether the lender of the servant is or is not paid for his services (*i*).

Hire of vehicles and drivers.—In an ordinary case of hiring a vehicle and driver, the driver does not become the servant of the hirer merely because the latter may have the right to indicate the destination to which he wishes to be driven; but no fixed line can be drawn at which, as a matter of law, the general employer of a driver ceases to be responsible and the temporary hirer becomes so; each case must depend on its own circumstances (*k*). Thus, in *Jones* v. *Liverpool Corporation* (*l*), the defendants, having their own water-cart, hired for it a horse and driver from X; the driver was paid by X and was not under the defendants' control except so far as their inspector gave him directions as to which streets to water. Injuries having been caused to the plaintiff by the negligence of the driver, it was held that the amount of "discretion and control" exercised over him by the defendants was not sufficient to make him their servant. On the other hand, in *Jones* v. *Scullard*, the defendant was the

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Telephone Co., [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; 81 L. T. 252, and for failure to perform statutory duties, see *Hole* v. *Sittingbourne Railway*, 6 H. & N. 488, and *Gray* v. *Pullen*, 5 B. & S. 981; 34 L. J. Q. B. 265.

(*i*) [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; 68 L. T. 512, approved in *Société Maritime Française* v. *Shanghai, etc., Co.*, 37 T. L. R. 379. See also *Rourke* v. *White Moss Colliery Co.*, 2 C. P. D. 205; 46 L. J. C. P. 283; 36 L. T. 49. Conversely, a servant lent to a contractor may become his servant for a particular purpose (see *Murray* v. *Currie*, L. R. 6 C. P. 24; 40 L. J. C. P. 26; 23 L. T. 557).

(*k*) See *Jones* v. *Scullard*, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 368.

(*l*) 14 Q. B. D. 890; 54 L. J. Q. B. 345.

owner of a brougham, horse and harness, which he kept with a livery stable keeper, from whom he hired a driver. Through the negligence of the driver the horse dashed through the windows of the plaintiff's shop. The particular driver had continuously driven the defendant for about six weeks before the accident. The horse was one which had been recently purchased by the defendant, and with which consequently the driver had but an imperfect acquaintance. It was held that there was evidence on which a jury might find that at the time of the accident the driver was acting as the defendant's servant (*m*).

Where a cab proprietor lets a horse and cab to a driver for the purpose of plying for hire at his own discretion and not subject to the proprietor's control, the relation between them at Common Law is that of bailor and bailee, not of master and servant; but, with regard to cabs plying for hire within the City of London and the Metropolitan Police District, by the *Metropolitan Hackney Carriage Act*, 1843, the proprietor is responsible to third persons for the acts of the driver, as if the relationship of master and servant existed between them (*n*).

(*m*) *Ubi supra*, reviewing all the earlier authorities and distinguishing on the facts *Quarman* v. *Burnett* (6 M. & W. 499; 9 L. J. Ex. 308; 55 R. R. 717). In this case two ladies, who owned a carriage, had for three years been in the habit of hiring a horse and driver from a job-mistress. They were always driven by the same man, to whom they paid a gratuity for each drive. An accident having been caused by his negligence, it was held that there was no evidence that he was acting as their servant. The materiality of the ownership of the horse lies in the fact that where the hirer is the owner, he is entitled to control the *manner of driving*, whereas in the cases of *Quarman* v. *Burnett* and *Jones* v. *Liverpool Corporation*, the hirers had no control over the driver except that they could indicate the direction in which he was to drive. But, as was pointed out in both these cases (see also *ante*, p. 526), any hirer may be liable for damage caused by his own actual interference or specific orders.

(*n*) 6 & 7 Vict. c. 86, and see *Venables* v. *Smith*, 2 Q. B. D. 279; 46 L. J. Q. B. 470; *King* v. *London, etc., Cab Co.*, 23 Q. B. D. 281; 58 L. J. Q. B. 456; 61 L. T. 34; *Keen* v. *Henry*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 211; 69 L. T. 671; *Gates* v. *Bill*, [1902] 2 K. B. 38; 71 L. J. K. B. 702; 87 L. T. 288; *Smith* v. *General Motor Cab Co.*, [1911] A. C., at p. 192; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370. The Towns Police Clauses Act, 1847, establishes a similar relationship in cases to which it applies (*Bygraves* v. *Dicker*, [1923] 2 K. B. 585; 92 L. J. K. B. 1021; 129 L. T. 688).

CHAPTER I.

TRESPASS, DETINUE, AND CONVERSION.

SECTION 1.— TRESPASS.

A trespass is a direct physical interference with the person, land or goods of another. To constitute a trespass, there must be some direct physical interference or injury; for consequential damage caused by an unlawful or negligent act the remedy is an action of case. Thus "if I throw a log of timber into the highway (which is an unlawful act), and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if, in throwing it, I hit another man, he may bring trespass, because it is an immediate wrong" (*a*). Every trespass is of itself an invasion of an absolute right, and accordingly (i) it is actionable without proof of special damage; and (ii) the plaintiff in the first instance need only prove the trespass, the burden then shifting to the defendant to prove some circumstances of justification or excuse; on the other hand, in an action of trespass on the case, it is for the plaintiff to prove both that he has suffered some actual damage and that it was due to some unjustifiable act on the part of the defendant (*b*).

Trespass to the person may be by assault, battery, or false imprisonment.

Assault and battery.—An *assault* is an attempt, offer or threat to use any unlawful force to another; *battery* is the actual use of any unlawful force. Thus, if a man strikes at another with a stick or throws a stone at him, but does not hit him, it is an assault; if he hits him it is a battery; every battery, therefore, includes an assault.

(*a*) *Per* Blackstone, J., in *Scott* v. *Shepherd*, 2 W. Bl. 892; 3 Wilson, 403.
(*b*) *Ante*, p. 496.

An *assault* is constituted by any attempt to apply unlawful force to another, or by any threat which is accompanied by, or consists of, any act or gesture showing a present intent to use unlawful force, *and* which is also accompanied by "a present ability to carry the threat into execution" (*c*). Thus—

(i) A being in B's workshop and refusing to leave, B and his workmen surrounded him, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out. It was held that this was an assault (*d*).

(ii) A advanced towards B in a threatening attitude and with the intent of striking B, but was stopped by another person just before he reached B. It was held that as A's blow would have reached B if he had not been stopped, he had committed an assault (*e*).

So, also, it has been held to be an assault to ride after a person, obliging him to run away into a garden to avoid being beaten (*f*). And where the master of a board school detained a child after school hours for not doing home lessons which, under the Elementary Education Acts, 1870 and 1876, he had no power to set, it was held to be an assault (*g*).

But a mere threat "not in the slightest degree executed" does not constitute an assault, nor will even acts and gestures if done or made in such circumstances or at such a distance that the threat cannot possibly be carried into effect (*h*), or if, in spite of the threat, the defendant uses words showing that he has no intention of carrying it into effect (*i*).

A *battery* includes every touching of another person in a rude, angry, or unlawful fashion. Some hostile or unlawful intention must be proved, so that the mere touching of a person in order to call his attention is not an assault (*k*): nor is a person guilty of

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(*c*) *Read* v. *Coker*, 13 C. B., at p. 860; 22 L. J. C. P. 201.
(*d*) *Id.*
(*e*) *Stephens* v. *Myers*, 4 C. & P. 349; 34 R. R. 819.
(*f*) *Martin* v. *Shoppee*, 3 C. & P. 373.
(*g*) *Hunter* v. *Johnson*, 13 Q. B. D. 225; 53 L. J. M. C. 182; 51 L. T. 791.
(*h*) *Cobbett* v. *Gray*, 4 Ex. 729; 19 L. J. Ex. 137.
(*i*) As, *e.g.*, where the defendant used threats of what he would do "were it not assize time" (*Tuberville* v. *Savage*, 1 Mod. 3).
(*k*) *Tuberville* v. *Savage* (*ubi supra*); and see *Coward* v. *Baddeley*, 4 H. & N. 478; 28 L. J. Ex. 260; 118 R. R. 562.

battery merely because he uses slight force when in a crowd, but if he "force his way in a rude, inordinate manner, it will be a battery" (*l*). And something more than mere passive obstruction must be shown, so that no tort is committed by a person who, without taking any active measures to prevent the plaintiff from entering a room, merely stands passively in the doorway (*m*). When the act is in itself unlawful, an evil or malicious intent is a matter of aggravation. Thus where parish officers cut off the hair of a female pauper by force and against her consent, it was held that the jury, in awarding damages, might take into consideration the fact that it was done with the expressed intention of "taking down her pride" (*n*).

Defences (*o*).—The defendant may prove—

1. His previous conviction or acquittal in summary proceedings (*p*).

2. That the act complained of does not amount to an assault or battery either because it was accidental (*i.e.*, involuntary) or that it was done by consent (*q*).

3. That it was excusable or justifiable.

Where a trespass to the person is the result of a lawful act it is a good *excuse* that it was neither intentional nor the result of negligence (*r*); but this excuse is no defence where the trespass is the immediate result of an unlawful action on the part of the defendant (*s*).

Trespass to the person is *justified*—

(i) If committed in self-defence, or in defence of a wife, husband, parent or child, master or servant, provided that the force used is not more than is necessary for

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(*l*) *Cole* v. *Turner*, 6 Mod. 149.

(*m*) *Innes* v. *Wylie*, 1 C. & K. 257; 70 R. R. 786.

(*n*) *Forde* v. *Skinner*, 4 C. & P. 239; 34 R. R. 791.

(*o*) See also the general exceptions to liability, *ante*, p. 501.

(*p*) *Ante*, p. 493.

(*q*) *Ante*, p. 505; and as to consent, see *Christopherson* v. *Bare*, 11 Q. B. 473; 17 L. J. Q. B. 109, and *Latter* v. *Braddell*, 50 L. J. Q. B. 448; 44 L. T. 369.

(*r*) *Stanley* v. *Powell*, [1891] 1 Q. B. 86; 60 L. J. Q. B. 52; 63 L. T. 809.

(*s*) *Sadler* v. *South Staffordshire, etc., Tramways Co.*, 23 Q. B. D. 17; 58 L. J. Q. B. 421; and see *James* v. *Campbell*, 5 C. & P. 372 (two persons were fighting and one of them unintentionally struck the plaintiff. *Held*, that absence of intention was no defence, though it might be urged in mitigation of damages).

defence (*t*), and is actually used for defence and not in revenge after all danger is past (*u*).

(ii) If committed in defence of property. "If a person enters [or attempts to enter (*x*)] another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary) without a previous request to depart; but if the person enters quietly, the other cannot justify turning him out without a previous request to depart" (*y*). If a person makes a disturbance in an inn or a private house, "the landlord . . . or occupier . . . is justified in telling him to leave the house, and if he will not do so, he is justified in putting him out" (*z*). So also a trespass to the person may be justified if it was committed by the defendant in resisting a forcible attempt to dispossess him of his goods (*a*), or in recovering goods of which he had been dispossessed (*b*). In all the above cases, as in the case of self-defence, no more force must be used than is reasonably necessary.

(iii) If committed to prevent a breach of the peace (*c*).

(iv) If committed in the lawful exercise of superior authority (*d*).

(*t*) *Cockroft* v. *Smith*, 11 Mod. 43; *Reece* v. *Taylor*, 4 N. & M. 469; 4 L. J. K. B. 74. "Under the plea of 'son assault demesne'" (*i.e.*, a plea of justification on the ground of self-defence) "the defendant must show an assault by the plaintiff *commensurate* with the act complained of by the plaintiff" (4 N. & M., at p. 470).

(*u*) *R.* v. *Driscoll*, 1 C. & M. 214.

(*x*) *Polkinhorn* v. *Wright*, 8 Q. B. 197; 15 L. J. Q. B. 70.

(*y*) *Tullay* v. *Reed*, 1 C. & P., at p. 6; 28 R. R. 766.

(*z*) *Wheeler* v. *Whiting*, 9 C. & P., at p. 265; 62 R. R. 749. So, also, churchwardens may "gently lay hands on those who disturb the performance of any part of divine service and turn them out of the church" (*Burton* v. *Henson*, 10 M. & W., at p. 108; 11 L. J. Ex. 348; 62 R. R. 531). See also *Noden* v. *Johnson* (*infra*), and Bullen & Leake's Pleadings (3rd ed.), p. 793.

(*a*) *Polkinhorn* v. *Wright* (*ubi supra*).

(*b*) See *Blades* v. *Higgs*, 10 C. B. (N.S.) 713; 30 L. J. C. P. 347.

(*c*) *Baynes* v. *Brewster*, 2 Q. B. 375; 11 L. J. M. C. 5; 57 R. R. 707. Compare *Noden* v. *Johnson*, 16 Q. B. 218; 20 L. J. Q. B. 95, where the defendant, being captain of a vessel, justified on the ground that he used no more force than was necessary to prevent the plaintiff, who was a passenger on his vessel, from making a disturbance and fighting with the other passengers.

(*d*) *Ante*, p. 505. "By the Common Law a similar power of moderate chastisement is given to the captain of a ship as there is to a parent and schoolmaster" (*Murray* v. *Moutrie*, 6 C. & P., at p. 473; and see *Lamb* v.

False imprisonment.—"Imprisonment is no other thing but the restraint of a man's liberty, whether it be in the open field . . . or in a man's own house, as well as in the common gaol; and . . . the party so restrained is said to be a prisoner so long as he hath not his liberty to go at all times to all places whither he will" (*e*).

The restraint must be *entire—i.e.*, within a particular space; thus it is not an imprisonment merely to prevent a person from going in a particular direction (*f*). But there can be an imprisonment without in fact laying hands upon the person of the party imprisoned (*g*); "so, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are obeyed, and they walk together in the direction pointed out by the constable, that is, *constructively*, an imprisonment"; and there may be a constructive imprisonment although the person imprisoned does not know or appreciate that he is subject to restraint, as, *e.g.*, where, without his knowledge, he is in fact under the restraint of police constables who have been stationed to control his movements and prevent him from leaving a particular place (*h*).

Burnett, 1 C. & J. 291). As to officers of the Army and Navy, see *ante*, p. 502. A husband has no right to chastise or imprison his wife, though he might have the right to restrain her if she "were about immediately to do something which would be to the dishonour of her husband"—as, *e.g.*, if he saw her in the act of going to meet a paramour (*R.* v. *Jackson*, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346; 64 L. T. 679). A wife cannot bring an action against her husband for an assault (*ante*, p. 498). And even after divorce she cannot sue him for an assault committed during coverture (*Phillips* v. *Barnet*, 1 Q. B. D. 436; 45 L. J. Q. B. 277; 34 L. T. 177). A wife may, however, take criminal proceedings against her husband for an assault, which may also constitute cruelty sufficient to enable her to obtain a separation order from a Court of summary jurisdiction or to found proceedings for judicial separation.

(*e*) Definition in *Termes de la Ley*, approved in *Meering* v. *Grahame-White Aviation Co.*, 122 L. T., at pp. 51, 53. For other similar definitions, see *Bird* v. *Jones*, 7 Q. B. 743; 15 L. J. Q. B. 82.

(*f*) *Bird* v. *Jones* (*ubi supra*; approved 44 L. T., at p. 53). A part of Hammersmith Bridge which is generally used as a public footway was appropriated for seats to view a regatta and separated from the carriage-way by a temporary fence. The plaintiff climbed over the fence, but the defendant then stationed two policemen to prevent him from passing along the footway, though he was told that he might go back into the carriage-way and proceed by it to the other side of the bridge. The defendant refused to do so, and remained where he was so obstructed for about half-an-hour. *Held*, that there was no imprisonment.

(*g*) *Warner* v. *Riddiford*, 4 C. B. (N.S.) 204; 114 R. R. 658 (approved 44 L. T., at p. 53, where it is cited as *Warner* v. *Burford*); see also *Grainger* v. *Hill*, 4 Bing. (N.C.) 212; 7 L. J. C. P. 85.

(*h*) *Meering* v. *Grahame-White Aviation Co.* (*ubi supra*).

The imprisonment must be by the defendant himself or by his orders; if the defendant merely states the facts to a police officer, who, in the exercise of his duty, acts upon his own initiative in arresting the plaintiff, the arrest is that of the police officer (*i*). And, if the plaintiff has already been arrested by the police, the fact that the defendant, at their request, signs the charge-sheet does not make him responsible for the imprisonment (*j*). Where, however, the police refused to detain the plaintiff unless the defendant made a charge against him and signed the charge-sheet, it was held that the imprisonment was by the defendant (*k*).

If "the opinion and judgment of a *judicial* officer are interposed between the charge and the imprisonment" (*l*), there is no cause of action in trespass for false imprisonment, though an action of case may lie for malicious prosecution. Thus no action lies for false imprisonment "where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the party charged to be taken into custody, and detained until the matter can be investigated" (*l*). Nor, where a plaintiff has been taken into custody and brought before a magistrate, does an action of false imprisonment lie in respect of imprisonment under a remand, which is the act of the magistrate (*m*).

Defences.—The defendant may set up any matter which would be a defence to an ordinary action of trespass to the person (*n*),

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(*i*) *Sewell* v. *National Telephone Co.*, [1907] 1 K. B., at p. 559; 76 L. J. K. B. 196; 96 L. T. 483; 23 T. L. R. 226; *Meering* v. *Grahame-White, etc.* (*ubi supra*).

(*j*) *Sewell* v. *National Telephone Co.* (*ubi supra*); and see *Grinham* v. *Willey*, 4 H. & N. 496; 28 L. J. Ex. 242.

(*k*) *Austin* v. *Dowling*, L. R. 5 C. P. 534; 39 L. J. C. P. 260; 22 L. T. 721.

(*l*) *Id.*, at p. 540.

(*m*) *Lock* v. *Ashton*, 12 Q. B. 871; 18 L. J. Q. B. 76. But a magistrate or a Judge of a Court of limited jurisdiction may himself be liable to an action for false imprisonment if he commits a person to prison on a matter on which he has no jurisdiction (*Mason* v. *Barker*, 1 C. & K. 100; *Houlden* v. *Smith*, 14 Q. B. 841; 19 L. J. Q. B. 170; 80 R. R. 415; and see *ante*, p. 502).

(*n*) *Ante*, pp. 531, 532. A curious instance of the maxim *Volenti non fit injuria* occurred in the case of *Herd* v. *Weardale, etc., Co.*, [1915] A. C. 67; 84 L. J. K. B. 121; 111 L. T. 660; 30 T. L. R. 620. Here a miner descended a coal mine at 9.30 A.M.; under the terms of his employment he was entitled to be brought to the surface at the end of his shift, which expired at 4 P.M. After descending the mine the plaintiff refused to do the work which he was directed to do, and, at 11 A.M., he demanded to be raised to the surface. The lift was available at about 1 P.M., but the plaintiff was not allowed to use it

and may also prove that the imprisonment was under a *justifiable arrest* (*o*)—*i.e.*—

1. That it was made under *Common Law authority*.

A *private person* may without any warrant arrest another—(i) to stay a breach of the peace committed in his presence (*p*); (ii) to prevent the infliction of deadly injury or the commission of treason or felony (*q*); (iii) where a felony is committed in his presence (*r*), or where, though not committed in his presence, he can prove its commission and has reasonable suspicion that the person arrested is guilty of that particular felony (*s*); (iv) where persons do not disperse after proclamation made under the Riot Act (*t*). A *constable* has all the powers of arrest of a private person, and, in addition, may without warrant arrest on a reasonable charge (*u*) or reasonable suspicion of felony (*x*), *even though no felony has been in fact committed* (*y*).

2. That it was made under *statutory authority*. By various statutes, which are outside the scope of this work, the power to arrest without warrant is given both to private persons and constables (*z*).

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until 1.30 P.M., and he brought an action against his employers claiming damages for false imprisonment in respect of this detention. *Held*, on the principle of *Volenti non fit injuria*, that the action could not be maintained. The plaintiff chose to go down the mine under a contract which gave him the right to return only at the end of his shift, and he had no right to demand special facilities for returning.

(*o*) For arrest generally, see Archbold's Criminal Law, pp. 997 *et seq.*, and Harris' Criminal Law, Book III, Chapter II.

(*p*) *Timothy* v. *Simpson*, 1 C. M. & R. 757; 4 L. J. M. C. 73; *Baynes* v. *Brewster*, 2 Q. B. 375; 11 L. J. M. C. 5; *Price* v. *Seeley*, 10 Cl. & F. 28; 59 R. R. 13.

(*q*) *Handcock* v. *Baker*, 2 B. & P. 260; 5 R. R. 587.

(*r*) *R.* v. *Price*, 8 C. & P. 282.

(*s*) *Walters* v. *W. H. Smith & Son*, [1914] 1 K. B. 595; 83 L. J. K. B. 335; 110 L. T. 345; 30 T. L. R. 158.

(*t*) *R.* v. *Fursey*, 6 C. & P., at p. 87; 40 R. R. 805.

(*u*) *Cowles* v. *Dunbar*, 2 C. & P. 565.

(*x*) *Beckwith* v. *Philby*, 6 B. & C. 635; 5 L. J. (o.s.) M. C. 132; 30 R. R. 484.

(*y*) *Id.*; and see *Walters* v. *W. H. Smith & Son* (*ubi supra*).

(*z*) See Archbold (*ubi supra*), and Harris' Criminal Law, p. 285. It may be mentioned that by s. 41 of the Larceny Act, 1916, any person to whom property is offered to be sold or pawned and who has reasonable cause to believe that any offence against the Act has been committed in respect of such property, may arrest and take before a magistrate the party offering the same, together with such property. In the case of pawnbrokers, this right is extended by s. 34 of the Pawnbrokers Act, 1872, which gives a pawnbroker the right to detain and give in charge a person who offers goods without being able to account satisfactorily for their possession.

3. That it was made under a *lawfully executed warrant, writ or order, issued or made by a competent tribunal.*

Trespass to land.—Trespass to land, or, as it was formerly called, trespass *quare clausum fregit*, is constituted by "any entry upon or any *direct and immediate* act of interference with the possession of land" (*a*). Thus it is a trespass, not only if the defendant actually enters upon the plaintiff's land, but if he commits any act of encroachment, such as placing rubbish against the plaintiff's wall (*b*), or pouring filth and stinking water upon the plaintiff's land (*c*), or building a house upon his own land with cellars under, and an upper storey projecting over, the land of the plaintiff (*d*). So also the improper use of a highway may be a trespass. "The soil of a highway belongs *prima facie* to the owner of the land adjoining it. If the land on either side is the property of different owners, each is owner of the soil on his side *ad medium filum* of the highway. But this ownership is subject to the right of the public to use the highway. Any use of the soil of the highway other than the legitimate use of it for the purposes of a highway is a trespass upon that soil as against the owner to whom it still belongs" (*e*). Thus it is a trespass to permit cattle to depasture upon a highway (*f*) or to search for game thereon (*g*), or to do anything thereon for the purpose of

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(*a*) Bullen and Leake's Pleadings (3rd ed.), at p. 415.

(*b*) *Gregory* v. *Piper*, 9 B. & C. 591; 33 R. R. 268.

(*c*) *Preston* v. *Mercer*, Hardres, 60, as explained in *Reynolds* v. *Clarke*, 2 Ld. Raym. 1399. But if the defendant merely *allowed* the filth and water to escape, the plaintiff's remedy would be by an action of case (*Tenant* v. *Goldwin*, 2 Ld. Raym. 1089); and see the rule in *Rylands* v. *Fletcher*, *post*, Chapter III.

(*d*) See *Lemmon* v. *Webb*, [1894] 3 Ch., at p. 18; affirmed, [1895] A. C. 1; 64 L. J. Ch. 205; 71 L. T. 647. But the encroachment by natural growth of the roots and boughs of A's trees over the land of B is not a trespass, but a nuisance ([1894] 3 Ch., at p. 24).

(*e*) *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B., at p. 155; 62 L. J. Q. B. 117; 68 L. T. 35. The legitimate use of a highway is, strictly speaking, merely for the purpose of passing and repassing (*ibid.*); and although in modern times a reasonable extension has been given to the use of highways as such, so that the Court would not tolerate an action for a trivial trespass, yet no use is legitimate which is inconsistent with the paramount idea that the right of the public is merely one of passage (*ibid.*; and see *Hickman* v. *Maisey*, *infra*).

(*f*) *Dovaston* v. *Payne*, 2 H. Bl. 527; 3 R. R. 497.

(*g*) *R.* v. *Pratt*, 4 E. & B. 860; 24 L. J. M. C. 113; 99 R. R. 792.

interfering with the adjoining owner's rights of sporting (*h*), or to make any use of it which is illegitimate as being "for too long a period and wholly disconnected with the purpose of passage," as, *e.g.*, by loitering upon it for an hour and a half to watch the training of horses upon the land of an adjoining owner (*i*).

Different strata of the soil may be the subject of distinct and separate rights, so that a landowner who has let the surface only may sue for trespass to the subsoil (*k*). And an action of trespass will lie not only for entry upon or interference with the land itself, but for interference with any corporeal property which is attached to the land, and to the *exclusive* possession of which the plaintiff is entitled, although he may have no other interest in the land, *e.g.*, a crop of growing corn or turnips (*l*). But it will not lie for interference with an incorporeal right unaccompanied by the exclusive possession of anything corporeal, *e.g.*, a right of common (*m*), an easement (*n*), or a mere licence (*o*).

Trespassers ab initio.—Where an authority is given to anyone by *law* and he abuses it by an act of *misfeasance*, he becomes a trespasser *ab initio*. The rule is stated and illustrated as follows in the old case of *Vaux* v. *Newman* (*p*): "When entry or licence is given to anyone by the law and he doth abuse it, he shall be a trespasser *ab initio*; but when an entry, authority or licence is given by the party, and he abuses it, then he must be punished for his abuse, but shall not be a trespasser *ab initio*." Thus, "the law gives authority to enter into a common inn or tavern; so to the owner of the ground to distrain damage-feasant; . . . to the commoner to enter upon the land to see his cattle; and such like. But if he who enters into the inn or

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(*h*) *Harrison* v. *Duke of Rutland* (*ubi supra*). Here the trespass consisted in going upon a highway, the soil of which was vested in an adjoining owner, for the purpose of interfering with a grouse drive.

(*i*) *Hickman* v. *Maisey*, [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; 82 L. T. 321.

(*k*) *Cox* v. *Glue*, 5 C. B. 533; 17 L. J. C. P. 162.

(*l*) *Wellaway* v. *Courtier*, [1918] 1 K. B. 200; 87 L. J. K. B. 299; 118 L. T. 256; 34 T. L. R. 115. And this is so even though the plaintiff's right to dispose of the crop when severed is limited—as, *e.g.*, where he is bound to consume part on the land (*id.*).

(*m*) *Wilson* v. *Mackreth*, 3 Burr. 1824.

(*n*) *Mainwaring* v. *Giles*, 5 B. & Ald., at p. 361; 24 R. R. 417.

(*o*) *Hill* v. *Tupper*, 2 H. & C. 121; 8 L. T. 792; 32 L. J. Ex. 217; 133 R. R. 605; *ante*, p. 443.

(*p*) *The Six Carpenters' Case* (1610), 8 Coke, 146 a.

tavern doth a trespass, as if he carries away anything; or if the owner, for damage-feasant, works or kills the distress, . . . or if the commoner cuts down a tree, in these and the like cases . . . he shall be a *trespasser ab initio.*" But a mere *non-feasance* cannot make a person a trespasser *ab initio*. So in the leading case it was held that the refusal by the defendants to pay for wine which they had drunk in a tavern did not render them trespassers *ab initio* so as to make their original entry into the tavern a trespass.

Who may maintain an action.—An action for trespass to land must be distinguished from an action of ejectment. In the latter case the defendant is in possession and the plaintiff, who is out of possession, is seeking to recover possession; and, since bare possession is a good title as against everyone but the true owner, the plaintiff is put to proof of his title (*q*). In trespass the plaintiff is in possession and the action is based upon disturbance of his possession, and, as against a mere trespasser, any kind of possession is sufficient to enable him to maintain an action (*r*). But a trespasser cannot by the very act of trespass, immediately and without any acquiescence by the true owner, acquire such possession as will enable him to maintain an action for trespass against the true owner (*s*). As against a mere trespasser who is in occupation of land, the true owner by entry

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(*q*) This does not, however, apply when the person against whom the action of ejectment is brought acquired his possession as a mere intruder and trespasser on the plaintiff, who can then recover against the defendant on the ground that his prior possession is sufficient title against him (*Davison* v. *Gent*, 1 H. & N. 744; 26 L. J. Ex. 122; *Asher* v. *Whitlock*, L. R. 1 Q. B. 1; 35 L. J. Q. B. 17; *Perry* v. *Clissold*, [1907] A. C. 73; 76 L. J. P. C. 15; 95 L. T. 890; 23 T. L. R. 232). And where the action is brought by a landlord against his tenant, the latter is estopped from denying the title of the former at the date when possession was given (*Doe* v. *Baytup*, 3 A. & E. 188; 4 L. J. K. B. 263; 42 R. R. 359), though he may show that it has since determined (*Doe* v. *Edwards*, 5 B. & Ad. 1065; *Claridge* v. *Mackenzie*, 4 Man. & G. 143; 11 L. J. C. P. 72; 61 R. R. 504).

(*r*) *Graham* v. *Peate*, 1 East, 243; 6 R. R. 268; *Harper* v. *Charlesworth*, 4 B. & C., at pp. 594, 595; 3 L. J. (o.s.) K. B. 265; 28 R. R. 405. See also *Perry* v. *Clissold* (*ubi supra*). But a mere lodger cannot bring trespass or ejectment (*Allan* v. *Liverpool Overseers*, L. R. 9 Q. B., at pp. 191, 192; 43 L. J. M. C. 69; 30 L. T. 93.

(*s*) *Browne* v. *Dawson*, 12 Ad. & E. 624; 10 L. J. Q. B. 7. That is to say a defendant cannot by a mere trespass and ejection of the plaintiff, invert the burden of proof, either in an action of trespass or ejectment (see note (*q*), *supra*).

acquires possession and may maintain an action of trespass against him if he wrongfully continues on the land (*t*).

The possession of the plaintiff may be actual or *constructive*, *i.e.*, possession through the agency of a servant (*u*). But it must be an existing possession; thus, for example, the assignee of a lease cannot maintain an action of trespass before entry by him (*x*). It is, however, sufficient for the plaintiff to show that he had a right to possess at the time of the trespass and actual possession before action: his possession in such a case *relates back* to the time when the title arose, and for the purposes of the action he is deemed to have been in possession from that time (*y*).

Where land is in the possession of a tenant an action of trespass can be brought only by him, not by the reversioner, who may however maintain an action of case for any *permanent* injury to his reversion (*z*). Joint tenants and tenants in common cannot maintain an action of trespass against each other unless there has been something amounting to an ouster of one by the other (*a*).

The plaintiff is not bound to prove any unlawful intent or negligence (*b*) on the part of the defendant, nor is it any defence that the trespass was committed by mistake (*c*). Nor is the plaintiff bound to prove any special damage (*d*). An action for trespass must be brought within six years (*e*); but if the trespass continues after judgment a new action can be brought (*f*).

(*t*) *Butcher* v. *Butcher*, 7 B. & C. 399; 6 L. J. (o.s.) K. B. 51; 31 R. R. 237.

(*u*) *Bertie* v. *Beaumont*, 16 East, 33.

(*x*) *Harrison* v. *Blackburn*, 17 C. B. (N.S.) 67; 34 L. J. C. P. 109.

(*y*) *Barnett* v. *Guildford* (*Earl*), 11 Ex. 19; 24 L. J. Ex. 281; *Ocean Accident, etc., Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493; 74 L. J. K. B. 799; 93 L. T. 381; 21 T. L. R. 610.

(*z*) *Baxter* v. *Taylor*, 4 B. & Ad. 72; 2 L. J. K. B. 65; 38 R. R. 227; *Mayfair Property Co.* v. *Johnston*, [1894] 1 Ch. 508; 63 L. J. Ch. 399; 70 L. T. 485; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch., at p. 404; 80 L. J. Ch. 145; 103 L. T. 751; 27 T. L. R. 133.

(*a*) *Jacobs* v. *Seward*, L. R. 5 H. L., at p. 472; 41 L. J. C. P. 221; 27 L. T. 185; and see *Murray* v. *Hall*, 7 C. B. 441; 18 L. J. C. P. 161; 78 R. R. 708.

(*b*) See *Tillett* v. *Ward*, 10 Q. B. D. 17; 52 L. J. Q. B. 61; 47 L. T. 546.

(*c*) *Basely* v. *Clarkson*, 3 Lev. 37.

(*d*) *Williams* v. *Morland*, 2 B. & C., at p. 916; 2 L. J. (o.s.) K. B. 191; 26 R. R. 579.

(*e*) *Ante*, p. 506.

(*f*) *Bowyer* v. *Cook*, 4 C. B. 236.

Remedies other than by action.

1. *Right to eject and re-enter.*—Where the person on whose premises a trespass is threatened or committed is in possession he may, as we have seen, use reasonable force to prevent the trespass or eject the trespasser (*g*). And, as soon as a person who is entitled to possession enters in the assertion of his right, the law immediately vests the actual possession in him and his actual possession plus his right outweighs the actual possession of the person on whom he enters, who becomes a trespasser and can be expelled (*h*). Accordingly, if an owner is out of possession he may re-enter and eject a trespasser if he uses no more force than is necessary. But, if he uses more force than is necessary, he is liable to an action of damages. And if he makes a "forcible entry" within the meaning of 5 Rich. 2, stat. 1, c. 7, he is liable to an indictment; this statute, however, gives no civil remedy to the trespasser, since the entry, though a breach of the statute, is not unlawful as against him (*i*).

2. *Distress damage-feasant.*—Where animals or other chattels are wrongfully damaging land they may be distrained *damage-feasant* by the possessor of the land and detained in order to compel their owner to make compensation for the damage (*k*). But there is no power of sale (*l*), and no action for damages can be maintained as long as the distress is detained (*m*). An animal that is trespassing and doing damage to property may be killed only if no less violent measures will suffice to protect the property (*n*).

(*g*) *Ante*, p. 532.

(*h*) *Jones* v. *Chapman*, 2 Ex., at p. 821; *Lows* v. *Telford*, 1 A. C., at p. 426; 45 L. J. Ex. 613; 35 L. T. 69; *Hemmings* v. *Stoke Poges Golf Club* (*infra*).

(*i*) *Hemmings* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720; 89 L. J. K. B. 744; 122 L. T. 479; 36 T. L. R. 77, overruling *Newton* v. *Harland*, 1 Man. & G. 644; 10 L. J. C. P. 11; 56 R. R. 488; *Beddall* v. *Maitland*, 17 Ch. D. 174; 50 L. J. Ch. 401; and *Edwick* v. *Hawkes*, 18 Ch. D. 199; 50 L. J. Ch. 577, so far as it followed those cases. The statute provides "that none from henceforth make entry into any lands and tenements but in case where entry is given by law, and in such case not with strong hand nor with multitude of people, but only in lawful, peaceable, and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof be ransomed at the King's will."

(*k*) See *Green* v. *Duckett*, 11 Q. B. D. 275; 52 L. J. Q. B. 435; 48 L. T. 677.

(*l*) In case of distress by a landlord, the power of sale is statutory (*ante*, p. 473).

(*m*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608; 63 L. J. Q. B. 767; 70 L. T. 450.

(*n*) *Miles* v. *Hutchings*, [1903] 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T.

Defences.—The defendant may (i) deny the trespass; (ii) deny the plaintiff's possession; or (iii) assert his own right of possession or title to the land. But it is not sufficient for the defendant to prove that the plaintiff, being in possession is not the true owner, unless he himself is, or he can justify his acts by the authority of a third person who is, the true owner. He cannot assert the bare title of a third person (*jus tertii*) except for the purpose of proving that he acted under the authority of that title (*o*).

The defendant may also justify on the ground that he entered by leave and licence of the plaintiff (*p*), or by virtue of some authority given by law, as, *e.g.*, to retake his goods which had been placed upon the land by the plaintiff (*q*), or to abate a nuisance (*r*), or to avert an imminent danger to his own property (*s*), or in execution of legal process (*t*).

Trespass to goods.—Trespass to goods is " an actual taking of, or any direct and immediate injury to " goods in the possession of the plaintiff (*u*). Thus, " scratching the panel of a carriage would be a trespass " (*x*).

" The plaintiff in an action of trespass must at the time of the trespass have the present possession of goods, either actual or constructive, or a legal right to the immediate possession (as, *e.g.*, a bailor in the case of a bailment determinable at his will), which is said in the case of personal property to draw to it the

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420 (dog trespassing and chasing game). See also *Vere* v. *Lord Cawdor*, 11 East, 568; 11 R. R. 269; *Taylor* v. *Newman*, 4 B. & S. 69; 32 L. J. M. C. 186; 129 R. R. 657. The police may detain any stray dog found in a highway or place of public resort, and if not claimed, may sell or destroy it (6 Edw. 7, c. 32, ss. 3, 4). If a dog is dangerous and not kept under proper control, application may be made to justices, who may order it to be destroyed (34 & 35 Vict. c. 56, s. 2).

(*o*) Bullen & Leake's Pleadings (3rd ed.), p. 801; *Chambers* v. *Donaldson*, 11 East, 65; 10 R. R. 435.

(*p*) *Ante*, p. 505.

(*q*) *Anthony* v. *Haneys*, 8 Bing. 186; 1 L. J. C. P. 81; 34 R. R. 670.

(*r*) *Post*, Chapter II.

(*s*) *Cope* v. *Sharpe*, [1912] 1 K. B. 496; 81 L. J. K. B. 346; 106 L. T. 56 (trespass upon plaintiff's property by defendant in order to extinguish a fire which was threatening his own property).

(*t*) See Bullen & Leake's Pleadings (3rd ed.), p. 770.

(*u*) Bullen & Leake's Pleadings (3rd ed.), p. 414.

(*x*) *Fouldes* v. *Willoughby*, 8 M. & W., at p. 549; 10 L. J. Ex. 364; 58 R. R. 803.

possession (*y*). But, as in the case of trespass to land, any kind of possession is good as against a wrongdoer (*z*). A reversioner cannot sue in trespass (*a*), though he may bring an action of case for any permanent injury to his reversionary interest (*b*). The doctrine of "relation back" does not apply so as to convert into a trespass an act which was innocent when committed, but where an act is a trespass at the time of its commission an action may be maintained by a person who subsequently acquires a right to possession, thus an administrator can maintain an action for trespass against anyone who, between the death and the date of the grant, has committed a trespass to the goods of the deceased (*c*).

Replevin.—In an action of trespass, even where the plaintiff had actually been dispossessed of goods, he could recover only damages and not the goods themselves. But by the process of replevin a person out of whose possession goods were unlawfully taken was enabled to obtain their return until the validity of his claim could be determined. The remedy of replevin is available in all cases of wrongful taking of goods and chattels (*d*), but its ordinary use is in cases of distress for rent or distress damage-feasant. The procedure is now governed by statute and consists of two parts, *i.e.* (i) the *replevy* by which re-delivery of the goods is obtained; and (ii) *the action of replevin.*

(i) The claimant must give security, to be approved of by a County Court Registrar, for an amount sufficient to cover the alleged rent or damage, or, if goods have been seized otherwise than under colour of distress, the value of the goods, and in either case the probable costs of the action, conditioned to commence an action of

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(*y*) Bullen & Leake's Pleadings (*ubi supra*); *Johnson* v. *Diprose*, [1893] 1 Q. B., at p. 515; 62 L. J. Q. B. 291; 68 L. T. 485.

(*z*) *Jefferies* v. *Great Western Railway*, 25 L. J. Q. B. 107. As to the right of a bailee to sue, see *ante*, pp. 298, 299, and *post*, pp. 549, 550.

(*a*) *Gordon* v. *Harper*, 7 T. R. 9; 4 R. R. 369.

(*b*) *Mears* v. *London and South Western Railway*, 11 C. B. (N.S.) 850; 31 L. J. C. P. 220; 6 L. T. 190.

(*c*) *Tharpe* v. *Stallwood*, 5 Man. & G. 760; 12 L. J. C. P. 241. Since the Land Transfer Act, 1897, the title of the administrator has related back to the death as to real estate as well as personal estate (*In bonis Pryse* ([1904] P. 301; 73 L. J. P. 84; 90 L. T. 747).

(*d*) *Mellor* v. *Leather*, 1 E. & B. 619; 22 L. J. M. C. 76; 93 R. R. 310; and see Bullen & Leake's Pleadings (3rd ed.), p. 392.

replevin against the seizor within one week in the High Court, or one month in the County Court, and to prosecute such action with effect (*i.e.*, to a successful termination) and without delay and to make a return of the goods if a return thereof shall be adjudged. For this purpose the claimant must give notice to the Registrar of the County Court of the district in which the cattle or goods have been seized, stating in what Court he intends to commence his action and what security he proposes. The Registrar gives notice to the seizor, who may attend and object to the security. If the security is approved and completed, the Registrar issues his warrant to the high bailiff, directing him to replevy and deliver the goods to the claimant (termed the replevisor) (*e*).

(ii) The replevisor must then proceed with his action in the High Court or County Court. If he succeeds he is entitled to keep the goods and to recover the expenses to which he has been put in replevying them and any special damage which he has incurred through their seizure (*f*). If the defendant succeeds, he obtains judgment for the return of the goods, or, *in the alternative* (i) if the distress is for rent, for the value of the goods or amount of the rent; and (ii) if the distress is for damage-feasant, for the amount of the damage (*g*).

Recaption.—Originally a dispossessed owner of goods could not retake them except "on fresh pursuit" (*h*). But after the action of replevin it was settled that he might retake them whenever he could find them, even by force, provided that no unnecessary violence was used (*i*). But his right ceases as soon as the goods have been sold in market overt to a person buying

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(*e*) County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 135, 136; and see County Court Forms Nos. 286—289.

(*f*) *Gibbs* v. *Cruikshank*, L. R. 8 C. P. 454; 42 L. J. C. P. 273; 28 L. T. 735; *Smith* v. *Enright*, 63 L. J. Q. B. 220; 69 L. T. 724.

(*g*) County Court Rules Order 34, rr. 3—5. Forms 290—292.

(*h*) See Williams' Personal Property, Introductory Chapter, s. 2.

(*i*) *Blades* v. *Higgs*, 10 C. B. (N.S.) 713; 30 L. J. C. P. 347; 4 L. T. 551.

them in good faith and without notice of any defect or want of title on the part of the seller (*k*).

Section 2.—*Detinue and Conversion.*

The rights of a dispossessed owner of goods were further increased by means of the actions of detinue and conversion, in which, as in ejectment, the plaintiff relied, not upon his actual possession, but upon his immediate right to possess.

Detinue was originally an action for breach of contract to deliver a specific chattel, but was extended to the case of a detainer of goods by one who had gained possession of them by finding, and who therefore had no right to detain from the true owner. Later it was allowed to be brought either upon an allegation of a delivery (*detinue sur bailment*) or of a finding (*detinue sur trover*) against anyone who unlawfully detained goods from the person entitled to their immediate possession, without regard to the means by which the defendant obtained possession of them; and it was laid down that the gist of the action is the unlawful detainer (*l*). The usual evidence of the detention is that the defendant refuses or fails to deliver the goods to the plaintiff when demanded (*m*). The formal action of detinue has now been replaced by an action for the detention of goods (which is, however, governed by the same rules of substantive law as the action of detinue), in which the plaintiff claims the return of the goods themselves, or their value, and damages for their detention (*n*). Before 1854 the defendant, under a judgment against him, had the option to deliver the goods or to retain them and pay the value assessed by the jury. But by s. 78 of the *Common Law Procedure Act*, 1854, it was provided that, upon

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(*k*) *Ante*, p. 358.

(*l*) See Williams' Personal Property (*ubi supra*), and Bullen & Leake's Pleadings (3rd ed.), p. 311. These allegations of finding and delivery were not traversable and were abolished by the Common Law Procedure Act, 1852. For some time there was a controversy as to whether detinue was an action of contract or of tort, but it is now settled that it is an action of tort (*Bryant* v. *Herbert*, 3 C. P. D. 389; 47 L. J. C. P. 670). See also *ante*, p. 490.

(*m*) Bullen & Leake's Pleadings (3rd ed.), p. 312, and see *Reeve* v. *Palmer*, 5 C. B. (N.S.) 84; 27 L. J. C. P. 327.

(*n*) See *Donald* v. *Suckling*, L. R. 1 Q. B., at p. 601; 35 L. J. Q. B. 232; 14 L. T. 772.

the application of the plaintiff, the Court may order execution to issue for the return of the chattel, without giving the defendant the option of retaining it upon paying its assessed value. And though this Act (with some exceptions) was repealed by the Statute Law Revision Act, 1883, the same provision is now contained in the Rules of Court (*o*). But the power vested in the Court to order the delivery up of a particular chattel is discretionary and ought not to be exercised where the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate (*p*).

Conversion.—In modern times a dispossessed owner of goods acquired a further remedy in the action of trover, or trover and conversion, in which he could recover the *value* of his goods. The name of trover is due to the original form of the action, when it was applicable only to goods found and converted to his own use. Later it was extended to all conversions of goods, the allegation of the loss and finding becoming fictitious and not traversable, and being finally abolished by the Common Law Procedure Act, 1852 (*q*). The modern action of conversion lies for any "unauthorised act which deprives another of his property permanently or for an indefinite time" (*r*). Thus it is conversion if goods are sold by a hirer (*s*), or delivered to the wrong person by a carrier (*t*) or warehouseman (*u*), or if a sheriff in levying execution sells the wrong person's goods (*x*),

(*o*) Order XLVIII, r. 1. An order for the issue of a writ of delivery can be made under this rule whether the value of the property has been assessed or not, which was doubtful under the language of the Common Law Procedure Act (*Hymas* v. *Ogden*, [1905] 1 K. B. 246; 74 L. J. K. B. 101; 91 L. T. 832). Where the defendant satisfies a judgment for the value of the goods, the transaction operates as a sale of the goods to him by the plaintiff (*Ex p. Drake*, 5 Ch. D., at p. 871; 46 L. J. Bk. 105; 36 L. T. 677).

(*p*) *Whiteley* v. *Hilt*, [1918] 2 K. B. 808; 87 L. J. K. B. 1058; 34 T. L. R. 502.

(*q*) Williams' Personal Property (*ubi supra*). Bullen & Leake's Pleadings (3rd ed.), p. 290; and see *Burroughes* v. *Bayne*, 5 H. & N., at p. 301; 29 L. J. Ex. 188; 2 L. T. 16.

(*r*) *Hiort* v. *Bott*, L. R. 9 Ex., at p. 89; 43 L. J. Ex. 81; 30 L. T. 25.

(*s*) *Cooper* v. *Willomatt*, 1 C. B. 672; 14 L. J. C. P. 219.

(*t*) *Wyld* v. *Pickford*, 8 M. & W. 443; 10 L. J. Ex. 382.

(*u*) *Hiort* v. *London and North Western Railway*, 5 Ex. D. 188; 48 L. J. Ex. 545; 40 L. T. 674.

(*x*) *Glasspoole* v. *Young*, 9 B. & C. 696; 7 L. J. (o.s.) K. B. 305; 33 R. R. 294.

or if a person buys and takes possession of goods which have been improperly sold (*y*), or generally if a person "however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person" (*z*). "A demand and refusal is always *evidence* of a conversion. If the refusal is in disregard of the plaintiff's title and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title of the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion" (*a*). Thus, where goods are demanded from a servant in whose custody they are, his refusal to deliver them until he has had an opportunity of obtaining instructions from his master is not a conversion (*b*).

But in order to constitute a conversion there must always be an intention of the defendant to take to himself the possession of the goods or to deprive the plaintiff of it. Accordingly, though the total destruction of the plaintiff's goods by the defendant is a conversion, a mere injury amounts only to a trespass (*c*). And though the simple asportation of a chattel is a trespass it does not amount to a conversion independently of any claim over it, either in favour of the defendant himself or any third person. Thus, in *Fouldes* v. *Willoughby* (*d*), the plaintiff embarked on the defendant's ferry boat with some horses; the defendant, in order to get rid of the plaintiff, who was alleged to have behaved improperly on the boat, refused to carry the horses and put them on shore; the plaintiff having brought an action for conversion it was held that the simple removal of the horses, "for a purpose wholly unconnected with any the least denial of the right of the

(*y*) *Hilberry* v. *Hatton*, 2 H. & C. 822; 30 L. J. Ex. 190; 10 L. T. 39.
(*z*) *Hollins* v. *Fowler*, L. R. 7 H. L., at p. 795; 44 L. J. Q. B. 169.
(*a*) *Hollins* v. *Fowler*, L. R. 7 H. L., at p. 766; and see *Burroughes* v. *Bayne (ubi supra)*; *Cobbett* v. *Clutton*, 2 C. & P. 471.
(*b*) *Alexander* v. *Southey*, 5 B. & Ald. 247; 24 R. R. 348. "An unqualified refusal is almost always conclusive evidence of a conversion: but if there be a qualification annexed to it, the question then is, whether it be a reasonable one" (5 B. & Ald., at p. 249).
(*c*) *Simmons* v. *Lillystone*, 8 Ex. 431; 22 L. J. Ex. 217.
(*d*) 8 M. & W. 540; 10 L. J. Ex. 364; 58 R. R. 803.

plaintiff to the use and enjoyment of them " did not amount to a conversion.

An agent who commits a conversion is not excused merely because he acted in good faith under the instructions of his principal and in the ordinary course of his business. Thus, in the case of *Consolidated Co.* v. *Curtis*, the owner of certain furniture assigned it by bill of sale to the plaintiffs but subsequently employed the defendants, who were auctioneers, to sell it by auction on her behalf at her residence. The defendants, who had no notice of the bill of sale, accordingly sold the furniture at the residence of the assignor, and, in the ordinary course of their business, delivered it to the purchasers. It was held that as the defendants " transferred as far as in them lay the dominion over and property in the goods to the purchasers," they were guilty of a conversion (*e*). But an auctioneer or broker who does not himself exercise any dominion over goods but merely settles the price, is not guilty of a conversion (*f*). Nor is any intermediate agent, such as a packing agent, liable for conversion if he acts merely as a conduit pipe for the purpose only of changing the position or custody of goods and not the property in them (*g*). In the case of *Hollins* v. *Fowler* (*h*), it was suggested as a general rule by Blackburn, J., that " one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods (*i*), or entrusted with their custody. . . . Thus, a warehouseman with whom goods

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(*e*) [1892] 1 Q. B. 495; 61 L. J. Q. B. 325. Compare *Stephens* v. *Elwall*, 4 M. & S. 259; 16 R. R. 458; *Cochrane* v. *Rymill*, 40 L. T. 744. *Barker* v. *Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411. The proposition stated in the headnote to *Turner* v. *Hockey*, 56 L. J. Q. B. 301 is not law ([1892] 1 Q. B., at p. 502).

(*f*) *Cochrane* v. *Rymill*, 40 L. T., at p. 746; *National Mercantile Bank* v. *Rymill*, 44 L. T. 767; *Barker* v. *Furlong*, [1891] 2 Ch., at p. 181.

(*g*) *Greenway* v. *Fisher*, 1 C. & P. 190; *Barker* v. *Furlong*, [1891] 2 Ch., at p. 182; 60 L. J. Ch. 368.

(*h*) L. R. 7 H. L., at pp. 766, 767.

(*i*) " The finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And, therefore, it is no conversion if he *bona fide* removes them to a place of security." *Id.*, at p. 767.

have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, although that person turns out to have no authority from the true owner" (*k*).

The damages in an action for conversion may be nominal (if the conversion was merely trivial or technical (*l*) or substantial, but they cannot exceed the value of the goods (*m*). Where the full value has been recovered the satisfaction of the judgment vests the property in the goods in the defendant (*n*). Where there is a conversion by a wrongful sale of goods, the owner may elect to waive the tort and to sue the defendant for the proceeds of the sale as money had and received to the use of the plaintiff (*o*).

Who may maintain an action for detinue or conversion.—The plaintiff must either have the immediate right to possess or, in case of conversion, the goods must have been in his actual or constructive possession at the time of the conversion (*p*). A bailor can therefore sue in detinue or conversion only when he has an immediate right to the possession of the goods which are the subject of the bailment (*q*). But, since possession carries

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(*k*) Another illustration is given by Bramwell, L.J., in *National Mercantile Bank* v. *Rymill*, 44 L. T., at p. 767. "Take the case of a man who steals a portmanteau and takes it to a cloakroom at a railway station and afterwards returns with the ticket, and asks to have the portmanteau back, or delivers the ticket to an accomplice, whom he sends to get the portmanteau. In such a case as that, suppose the servants of the railway company delivered the portmanteau to the thief or to the accomplice, can it be contended for a moment that an action for the conversion of the portmanteau would lie against the railway company?"

(*l*) See *Kirk* v. *Gregory*, 1 Ex. D. 55; 45 L. J. Ex. 186; 34 L. T. 488; *Hiort* v. *London and North Western Railway*, 4 Ex. D. 188; 48 L. J. Ex. 545.

(*m*) *Balme* v. *Hutton*, 9 Bing., at p. 477; 2 L. J. Ex. 116.

(*n*) *Brinsmead* v. *Harrison*, L. R. 6 C. P. 584; 40 L. J. C. P. 281; 24 L. T. 798.

(*o*) See *Rice* v. *Reed*, [1900] 1 Q. B. 54; 69 L. J. Q. B. 33; 81 L. T. 410. As to following the proceeds of the sale in the hands of third persons, see *Le Comité des Assureurs Maritimes* v. *Standard Bank of South Africa*, 1 Cab. & El. 87.

(*p*) See *Gordon* v. *Harper*, 7 T. R. 9; *Nyberg* v. *Handelaar*, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709; 67 L. T. 361. But in case of conversion, the doctrine of relation back may apply so as to enable a plaintiff to maintain an action for a conversion before his title accrued (*Balme* v. *Hutton*, 9 Bing. 471). The possession of chattels by a *cestui que trust* in accordance with the provisions of the trust is in law the possession of the trustee (*Barker* v. *Furlong*, *ubi supra*).

(*q*) *Jelks* v. *Hayward*, [1905] 2 K. B. 460; 74 L. J. K. B. 717; 92 L. T. 692; 21 T. L. R. 527. The owners of furniture let it under a hire-purchase

with it the right to possess as against everyone but the true owner, a bailee can maintain against a wrongdoer an action of detinue or conversion (*r*). So also a finder of goods can maintain detinue or conversion against anyone who cannot show a better title to the goods. Thus, in the case of *Armory* v. *Delamirie* (*s*), it was held that a chimney-sweeper's boy who had found a jewel could maintain an action of trover against a jeweller to whom he had shown the jewel for the purpose of ascertaining its value and who had refused to return it. But before goods can be "found" they must have been lost by their previous possessor, and they are not lost so long as they are in his possession. Thus, in the case of *South Staffordshire Water Co.* v. *Sharman*, the defendant was employed by the plaintiffs to clean out a pool of water on their land. Whilst so doing he found two rings and placed them in the hands of the police, who, failing to find the true owner, returned them to him. The plaintiffs then sued the defendant in detinue for the recovery of the rings, and it was held that they were entitled to recover, the general principle being that "where a person has possession of house or land, with a manifest intention to exercise control over it, and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*" (*t*).

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agreement, which contained a clause giving them a right to retake possession without notice if it should be taken in execution. *Held*, that they were entitled to maintain an action for conversion against the high bailiff, who seized and sold the goods under an execution, they having become entitled to the possession of the furniture immediately upon its seizure. A bailor who is not entitled to immediate possession may bring an action for any permanent injury to his reversionary interest in the goods (*Mears* v. *London and South Western Railway*, 11 C. B. (N.S.) 850; 31 L. J. C. P. 220; 6 L. T. 190; 132 R. R. 778).

(*r*) See *ante*, pp. 298, 299, and *post*, p. 550.

(*s*) 1 Str. 505.

(*t*) [1896] 2 Q. B. 44; 65 L. J. Q. B. 418; 48 L. T. 670; distinguishing *Bridges* v. *Hawkesworth* (21 L. J. Q. B. 75; 91 R. R. 850). In this case the plaintiff picked up a bundle of notes in a public shop, the shopkeeper not knowing they had been dropped and never exercising any control over them. The plaintiff gave the notes to the shopkeeper in order that he might advertise them, and, when the owner was not found, claimed to have them redelivered to him. It was held that he was entitled to do so, as they were never in the custody of the shopkeeper or "within the protection of his house." The rule stated in the text does not, however, apply to *treasure trove*, which "is where any gold or silver in coin, plate, or bullion is found

Jus tertii.—In an action of detinue or conversion, the general rule is that the plaintiff must prove his right to possession and that the defendant may therefore, in answer, set up the right of a third person (*u*). A bailee cannot, however, avail himself of the title of a third person as a defence to an action of detinue by the bailor except by showing that he is defending by authority of that person (*x*).

In an action of trespass, on the other hand, as has already been pointed out, any kind of possession is good as against a wrongdoer, who cannot therefore set up the title of a third person. And the same rule applies to a conversion which involves a trespass. Accordingly, a plaintiff who is in actual possession of goods at the time of a conversion, although himself a wrongdoer, can maintain an action for their conversion, and the defendant cannot set up the title of a third person (*y*).

And on the same principle, a bailee who is in possession of goods can maintain against a wrongdoer an action of trespass or conversion or an action on the case for negligence, even though he himself is under no liability to his bailor for the damage or loss in question (*z*). In such a case, as between the bailee and a stranger, the nature of the bailee's possession and the extent of his liability to the bailor is immaterial, so that the bailee can recover the full value of goods destroyed or converted. But, "as between bailor and bailee, the real interests of each must be enquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it: what he has received above his own interest he has received to the use of his bailor" (*a*).

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concealed in a house, or in the earth, or other private place, the owner thereof being unknown. . . . *Prima facie* the title to treasure trove is in the Crown: but . . . that title may be displaced by producing a grant to a subject of the franchise of treasure trove" (*Att.-Gen.* v. *Moore*, [1893] 1 Ch., at p. 683; 62 L. J. Ch. 607; 68 L. T. 574).

(*u*) *Leake* v. *Loveday*, 4 Man. & G. 972; 12 L. J. C. P. 65; 61 R. R. 707.

(*x*) *Rogers* v. *Lambert*, [1891] 1 Q. B. 318; *ante*, p. 299; 60 L. J. Q. B. 187.

(*y*) *Jefferies* v. *Great Western Railway Co.*, 5 E. & B. 802; 25 L. J. Q. B. 107; 103 R. R. 753; *Glenwood* v. *Phillips*, [1904] A. C., at p. 410; 73 L. J. P. C. 62; 90 L. T. 741; 20 T. L. R. 531.

(*z*) *The Winkfield*, [1902] P. 42; 85 L. T. 668; overruling *Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422.

(*a*) [1902] P., at pp. 60, 61.

Wrongful Distress.—A distress may be wrongful because it is (1) illegal; (2) excessive; or (3) irregular.

1. *Illegal distress.*—A distress is illegal where there is no right to distrain, as, *e.g.*, where there is no demise, or where no rent is in arrear or where privileged goods are seized. The remedies are (*b*)—

(i) Actions for trespass and conversion.

(ii) Replevin.

(iii) An action under the *Distress Act*, 1689 (*c*) for the double value of any goods seized and sold when no rent was due.

2. *Excessive distress.*—If a landlord seizes more goods than are sufficient to satisfy arrears of rent and expenses, he is liable, under the *Statute of Marlebridge* (*d*), to any action for excessive distress. But, in the absence of any special damage, no action lies for a distress under a *claim* of more than is due, provided that no more goods are seized than are sufficient to satisfy the amount due (*e*). If, upon an excessive distress, the goods are not sold, the plaintiff is entitled to recover nominal damages (*f*); if they are sold he is entitled to recover their fair value (*g*).

3. *Irregular distress.*—A distress is irregular where, though right to distrain exists, some wrongful act is committed after the seizure, as, *e.g.*, some irregularity in selling the goods. Formerly any such act rendered the landlord a trespasser *ab initio*, but, by s. 19 of the Distress for Rent Act, 1737, it was provided that "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party . . . distraining . . . the distress itself shall not be therefore deemed to be unlawful, nor the party . . . making it be deemed a trespasser . . . *ab initio*; but the party . . . aggrieved . . . shall or may recover full satisfaction for the special damage he . . . shall have sustained thereby, and no more."

(*b*) There are also certain summary remedies which are beyond the scope of this book.

(*c*) 2 W. & M. sess. 1, c. 5, s. 5.

(*d*) 52 Hen. 3, c. 4.

(*e*) *Tancred* v. *Leyland*, 16 Q. B. 669; 20 L. J. Q. B. 216; 83 R. R. 663.

(*f*) *Chandler* v. *Doulton*, 3 H. & C. 553; 34 L. J. Ex. 89; 11 L. T. 639; 140 R. R. 602.

(*g*) *Wells* v. *Moody*, 7 C. & P. 59; 48 R. R. 759.

CHAPTER II.

NUISANCES—INTERFERENCE WITH EASEMENTS AND NATURAL RIGHTS —INFRINGEMENT OF PATENTS, COPYRIGHT, AND TRADE MARKS.

SECTION 1.—*Nuisance.*

Nuisances may be either public or private. The remedy for a public nuisance is either criminal proceedings by way of indictment or civil proceedings by way of information, *i.e.*, an action by the Attorney-General in his official capacity, instituted either on his own motion, or at the relation of some person aggrieved, and claiming an injunction to restrain the continuance of the nuisance (*a*). A private individual cannot bring an action in respect of a public nuisance without joining the Attorney-General, unless (i) it also interferes with some private right of his own, as, *e.g.*, where an obstruction upon a public highway interferes with his private right of access from his premises to the highway; or (ii) though it does not interfere with any private right of his, he suffers "special damage peculiar to himself from the interference with the public right," as, *e.g.*, where his premises are rendered uncomfortable through smells arising from horses kept standing in the highway so long as to cause a public nuisance (*b*). For a private nuisance, the person aggrieved may bring an action claiming damages and, in a proper case, an injunction.

In addition to these remedies, either a public or private nuisance may be *abated* by the removal of that which causes the nuisance, provided, in case of a public nuisance, that it causes

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(*a*) *Att.-Gen.* v. *Shrewsbury Bridge Co.*, 21 Ch. D. 752; 51 L. J. Ch. 746; 46 L. T. 687.

(*b*) *Boyce* v. *Paddington Borough Council*, [1903] 1 Ch., at p. 114; 73 L. J. Ch. 28, reviewing the authorities: Examples of the first class of cases are *Lyon* v. *Fishmongers' Co.*, 1 A. C. 662; 46 L. J. Ch. 68; 35 L. T. 569, and *Fritz* v. *Hobson*, 14 Ch. D. 542; 49 L. J. Ch. 735; 42 L. T. 677: Examples of the second class are *Iveson* v. *Moore*, 1 Ld. Raym. 486, and *Benjamin* v. *Storr*, L. R. 9 C. P. 400; 43 L. J. C. P. 162; 30 L. T. 362.

some special and particular injury to the person abating it (*c*). Thus, if trees on one man's land overhang the land of another, the latter is entitled to cut them; and, if he can cut them from his own land, without committing a trespass or entering upon the land of his neighbour, he is entitled to do so at any time without notice; but, if a person desires to abate a nuisance, which can be abated only by going on the land of the person from whom the nuisance proceeds, he must, except in a case of emergency, give notice of his intention to do so (*d*). If there are two ways of abating a nuisance, the least mischievous must be chosen, and if by one of these alternative methods some wrong would be done to an innocent third party or to the public, that method cannot be justified at all (*e*).

There is a further difference between public and private nuisances in that the right to do what would otherwise amount to a private nuisance may be acquired as an easement by prescription (*f*) (either at Common Law or under the Prescription Act, 1832) (*g*), but the right to commit a public nuisance cannot be acquired by prescription (*h*).

(*c*) *Dimes* v. *Petley*, 15 Q. B., at p. 283; 19 L. J. Q. B. 449; and see *Colchester Corporation* v. *Brooke*, 7 Q. B. 339; 15 L. J. Q. B. 59.

(*d*) *Lemmon* v. *Webb*, [1895] A. C. 1; 64 L. J. Ch. 205; 71 L. T. 647. See also *Jones* v. *Williams*, 11 M. & W. 176; 12 L. J. Ex. 249; 63 R. R. 564, where it was also held that an entry upon the land of another to remove a nuisance caused by filth is justifiable without notice, when the owner of the land is an original wrongdoer by putting it there or possibly where the nuisance arises from his default in the performance of some obligation incumbent upon him. Where the branches of fruit trees upon the land of A overhang the land of B, the right of B to lop the branches does not carry with it the right to pick and appropriate the fruit, and if he does so he is guilty of a conversion (*Mills* v. *Brooker*, [1919] 1 K. B. 555; 88 L. J. K. B. 950; 121 L. T. 254; 35 L. T. R. 261).

(*e*) *Roberts* v. *Rose*, L. R. 1 Ex., at p. 89; 33 L. J. Q. B. 249; 10 L. T. 602; *Lagan Navigation Co.* v. *Lambeg, etc., Co.*, [1927] A. C., at p. 245.

(*f*) *Sturges* v. *Bridgman*, 11 Ch. D. 852; 48 L. J. Ch. 785; 41 L. T. 219. But an easement cannot be acquired by a user or enjoyment which cannot be prevented. The right to maintain a nuisance cannot, therefore, be gained by prescription unless it could have been prevented during the period of user (*Id.*).

(*g*) An easement may be acquired either by grant or prescription. In the latter case a claim to an easement could, at Common Law, be supported only by proof of user from time immemorial from which a lost grant was presumed. Proof of user as of right for twenty years afforded a presumption of user from time immemorial, but this might be rebutted by showing that the user in fact began within the time of legal memory, which was fixed at the

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(*h*) See note (*h*), p. 554.

A nuisance is none the less a nuisance because it existed before the plaintiff was living in the neighbourhood (*i*). Where, however, a locality has for a long time been devoted to noisy or offensive trades or businesses, neither an indictment (*k*) nor an action (*l*) will lie unless there is such an increase of annoyance and inconvenience as is unjustifiable, having regard to the local standard. The acts of several persons may, in the aggregate, constitute a nuisance for which each is liable, though their separate acts might not amount to a nuisance (*m*).

Public Nuisances.—A public or common nuisance is an unlawful act or omission to discharge a legal duty, the effect of which is to endanger the life, health, property, morals, or comfort of the public or to obstruct the public in the exercise or enjoyment of rights common to all his Majesty's subjects (*n*). Thus, anything which interferes with the comfort, enjoyment, or health of the public, or which is dangerous to the public safety,

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beginning of the reign of Richard I. By the Prescription Act, 1832, no claim by custom, prescription or grant to any way or other easement, or to any watercourse or the use of any water, if enjoyed as of right and without interruption for twenty years, can be defeated by proving merely that it was first enjoyed at any time prior to such period, and where it has been enjoyed for forty years the right is indefeasible, unless it was enjoyed by some consent or agreement by deed or writing (s. 2). When access of light to any building has been enjoyed for twenty years without interruption, the right is indefeasible unless enjoyed under some agreement or consent by deed or writing (s. 3). In certain special cases, however, these periods may be extended (ss. 7 and 8). The periods mentioned are in each case periods next before some action or suit in which the claim is brought in question, and no act is deemed an interruption unless submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof (s. 4). See Williams' Real Property, pp. 710—713.

(*h*) *Dewell* v. *Saunders*, Cro. Jac. 490.

(*i*) *Bliss* v. *Hall*, 4 Bing. N. C. 183; 7 L. J. C. P. 182; 44 R. R. 697. "Whether the man went to the nuisance or the nuisance came to the man, the rights are the same" (*Fleming* v. *Hislop*, 11 A. C., at p. 697).

(*k*) *R.* v. *Watts*, M. & M. 281; and see *R.* v. *Neville*, Peake, 91; 3 R. R. 662.

(*l*) *Polsue & Alfieri, Ltd.* v. *Rushmer*, [1907] A. C. 121; 76 L. J. Ch. 365; 96 L. T. 510; 23 T. L. R. 362.

(*m*) *Thorpe* v. *Brumfit*, L. R. 8 Ch. 650; *Lambton* v. *Mellish*, [1894] 3 Ch. 163; 63 L. J. Ch. 929; 71 L. T. 385.

(*n*) Archbold's Criminal Law, *Public Nuisance*, or "a common nuisance may be defined to be an offence against the public, either by doing a thing which tends to the annoyance of the King's subjects, or by neglecting to do a thing which the common good requires" (Hawkins' Pleas of the Crown (8th ed.), vol. i., p. 692, cited and approved in *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch., at p. 566; 66 L. J. Ch. 275; 76 L. T. 174).

is a public nuisance, as, for example, the accumulation of filth upon waste land (*o*), or the carrying on of a noxious or offensive trade (*p*), or the establishment of a smallpox hospital so as to expose the public to infection (*q*). The most important class of nuisances for our present purposes is that of highway nuisances.

Highway nuisances.—Any permanent and unauthorised obstruction of the *use* (*r*) of a highway which renders it less commodious than before to the public is a nuisance (*s*). An interference with the general right of passage is none the less a nuisance though it is caused by an act which is for the benefit of the public, or though the general benefit may outweigh the general inconvenience. Where, therefore, a highway was rendered less convenient to the general public by the construction of a tramway without legal authority, it was held to be no defence that the tramway was a considerable benefit to a large part of the public (*t*). But a temporary obstruction incidental to the use of property, as by the use of a coalhole in a pavement, or the erection of a hoarding for repairs, does not amount to a nuisance, provided that

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(*o*) *Att.-Gen.* v. *Tod Heatley* (*ubi supra*).

(*p*) *R.* v. *Garland*, 5 Cox, 165; *R.* v. *Neil*, 2 C. & P. 485; 31 R. R. 685; *R.* v. *Watts*, 2 C. & P. 486; 31 R. R. 686; *Att.-Gen.* v. *Cole*, [1901] 1 Ch. 205; 70 L. J. Ch. 148; 83 L. T. 725.

(*q*) *Metropolitan Asylums District* v. *Hill*, 6 A. C. 123 (*ante*, p. 503).

(*r*) *R.* v. *Bartholomew*, [1908] 1 K. B. 554; 77 L. J. K. B. 275; 98 L. T. 284; 24 T. L. R. 238; *Noble* v. *Harrison*, [1926] 2 K. B. 332; 95 L. J. K. B. 813; 135 L. T. 325; 42 T. L. R. 518.

(*s*) As, for example, its obstruction by a theatre queue (*Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631; 83 L. J. Ch. 281; 110 L. T. 284; 30 T. L. R. 75, approving *Barber* v. *Penley*, [1893] 2 Ch. 447; 62 L. J. Ch. 623; 68 L. T. 662), or by crowds attracted by effigies in a shop window (*R.* v. *Carlile*, 6 C. & P. 636; 40 R. R. 832; compare *R.* v. *Moore*, 3 B. & Ad. 184; 1 L. J. M. C. 30; 37 R. R. 383). A navigable river is a public highway (*Colchester Corporation* v. *Brooke*, 7 Q. B., at p. 360; 15 L. J. Q. B. 59; *Att.-Gen.* v. *Terry*, 9 Ch. 423; 30 L. T. 215). But "the owner of a sunken vessel which has become an obstruction to navigation through no fault of his own, and of which he has lost or relinquished the possession, management and control, is not under any obligation to remove it, or under any liability to pay or contribute to the payment of the expenses of its removal" (*Arrow S.S. Co.* v *Tyne Commissioners*, [1894] A. C., at p. 528; 63 L. J. P. 146; 71 L. T. 316). *Secus*, if he continues to exercise any control over it (*The Snark*, [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 16 T. L. R. 160). The obstruction of highways is summarily punishable under various statutes, *e.g.*, under s. 72 of the Highways Act, 1835.

(*t*) *R.* v. *Train*, 2 B. & S. 640; 31 L. J. M. C. 169; 127 R. R. 513; and see *R.* v. *Longton Gas Co.*, 2 E. & E. 651; 29 L. J. M. C. 118; 2 L. T. 14; 119 R. R. 889. Such undertakings are usually carried out under statutory powers, as to which see *ante*, p. 503.

the inconvenience is not unreasonable in extent or prolonged for an unreasonable time (*u*). And a highway may be dedicated subject to something which would otherwise be a nuisance, in which case the public must take it subject to the risk and inconvenience arising from its existing state when dedicated (*x*).

Again, anything on or near the highway which is a source of danger to persons actually using the highway (*y*) constitutes a public nuisance. Instances of this class of nuisances are (i) ruinous premises adjoining a highway (*z*); (ii) a spiked wall (*a*) or rotten fence (*b*) adjoining a highway; (iii) an excavation so near a highway as to be dangerous to persons accidentally deviating from the highway (*c*); (iv) a dangerous thing, such as a fire pail containing molten lead, left unguarded on the highway (*d*);

(*u*) See *R.* v. *Jones*, 3 Camp. 230; 13 R. R. 797; *Herring* v. *Metropolitan Board of Works*, 19 C. B. (N.S.), at p. 525; 147 R. R. 683; *Att.-Gen.* v. *Brighton, etc., Co.-operative Association*, [1900] 1 Ch. 276; 69 L. J. Ch. 204; 81 L. T. 762; 16 T. L. R. 144. But a person who opens a cellar in a highway is bound to take reasonable precautions to protect the public, and in default is liable to an action of negligence (*Daniels* v. *Potter*, 4 C. & P. 262; 34 R. R. 794; and see *Pickard* v. *Smith*, 10 C. B. (N.S.) 470; 128 R. R. 790; *ante*, p. 526.

(*x*) *Fisher* v. *Prowse*, 2 B. & S. 770; 31 L. J. Q. B. 212; 6 L. T. 711; 127 R. R. 547.

(*y*) See *Bromley* v. *Mercer*, [1922] 2 K. B. 126; 91 L. J. K. B. 577; 127 L. T. 282; 38 T. L. R. 496.

(*z*) *Tarry* v. *Ashton*, 1 Q. B. D. 314; 45 L. J. Q. B. 260; 34 L. T. 97; *ante*, p. 526.

(*a*) *Fenna* v. *Clare*, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238.

(*b*) *Harrold* v. *Watney*, [1898] 2 Q. B. 320; 67 L. J. Q. B. 771; 78 L. T. 788.

(*c*) *Barnes* v. *Ward*, 9 C. B. 392; 19 L. J. C. P. 195; 82 R. R. 375. In this case, the plaintiff fell at night into an area which had been made in the course of building a house and had been left unfenced, though it was separated from the highway only by a kerbstone intended for railings, and it was held to be no defence that the plaintiff was a trespasser. This defence, however, prevailed in the later case of *Hardcastle* v. *South Yorkshire Railway*, 4 H. & N. 67; 28 L. J. Ex. 139; 118 R. R. 331, where the excavation was at some distance from the highway. See also *Hounsell* v. *Smyth*, 7 C. B. (N.S.) 731; 29 L. J. C. P. 103; 1 L. T. 440; 121 R. R. 698. The Highway Act, 1835, makes it unlawful for any person to sink a pit or shaft, or to erect or cause to be erected any steam-engine, gin, or other like machinery, or any machinery attached thereto, within the distance of twenty-five yards, and a windmill within fifty yards, and furnaces within fifteen yards, from any part of any carriage-way, or cart-way or turnpike road, unless the same shall be within some house, building, wall, or fence sufficient to screen the same from such way or road, so as to make it not dangerous to passengers, horses, or cattle. And, by the Quarry Fencing Act, 1887, where any quarry dangerous to the public is in open or unenclosed land within fifty yards of a highway, and is not separated therefrom by a secure and sufficient fence, it must be kept reasonably fenced for the prevention of accidents.

(*d*) *Crane* v. *South Suburban Gas Co.*, [1916] 1 K. B. 33; 85 L. J. K. B. 172; 114 L. T. 71; 32 T. L. R. 74.

(v) machinery, such as a steam plough obstructing a highway and causing a horse to shy and run away (*e*), or a roller placed at the side of a highway with the same result (*f*); (vi) a steam traction engine driven along the highway and setting fire to hayricks by sparks which escaped from it (*g*).

Private Nuisances.—The law relating to ordinary private nuisances is the complement of the law relating to trespass. Each is concerned with conduct which amounts to an intrusion or interference by the defendant in an area or with a subject-matter over which the plaintiff has exclusive rights. But, while trespass comprises only physical entry or interference by the defendant himself or by something *tangible* whose entry or interference he has *directly and actually caused* (*h*), the law of nuisance gives a remedy against a defendant who has *caused* intrusion or interference by something *intangible* such as noise or smell, or who has *permitted* the intrusion of something, whether *tangible or intangible*, which has escaped from his own premises or control. An action of nuisance differs, however, from an action of trespass in the fact that it is based, not upon any invasion of property, but upon an interference with the right to the *enjoyment* of property (*h*).

Private nuisances are of two kinds: (1) those which cause a substantial interference with the comfort of human existence, such as nuisances by noise, smoke or smell; and (2) those which cause appreciable damage.

1. In the first class of cases, the plaintiff must prove that he

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(*e*) *Harris* v. *Mobbs*, 3 Ex. D. 268; 39 L. T. 164.

(*f*) *Wilkins* v. *Day*, 12 Q. B. D. 110; 49 L. T. 399. "If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance" (*Brown* v. *Eastern and Midlands Railway*, 22 Q. B. D., at p. 392; 58 L. J. Q. B. 212, where a heap of earth and refuse placed on the defendant's land at the side of the road and causing horses to shy, was held to be a nuisance).

(*g*) *Powell* v. *Fall*, 5 Q. B. D. 597; 49 L. J. Q. B. 428; 43 L. T. 562. In this case, the defence was that, since the use of the traction engine upon the highway was authorised, no action would lie in the absence of negligence It was, however, held that the authority given by the statute was merely a qualified authority, which, unlike the authority given by the Railway Acts, preserved all Common Law liabilities (*ante*, p. 503). Compare *Jones* v. *Festiniog Railway*, L. R. 3 Q. B. 733; 37 L. J. Q. B. 214; 18 L. T. 902; *Mansel* v. *Webb*, 88 L. J. K. B. 323; 120 L. T. 360.

(*h*) *Kine* v. *Jolly*, [1905] 1 Ch., at p. 487; 74 L. J. Ch. 174.

has been subjected to " sensible discomfort and annoyance " (*i*), regard being had " to the habits and requirements of ordinary people " (*k*) and to the character of the locality (*l*). " A dweller in towns cannot expect to have as pure air, as free from smoke, smell, or noise as if he lived in the country . . . and yet an excess of smoke, smell or noise may give a cause of action, but in each of such cases it becomes a *question of degree*, and the question is in each case whether it amounts to a nuisance which will give a right of action " (*m*).

In nuisances of this character " there are always two things to be considered, the right of the plaintiff and the right of the defendant " (*n*); the affairs of life cannot be carried on without mutual sacrifies of comfort, and " the law must regard the principle of mutual adjustment " (*o*). If a defendant is merely using his house for the ordinary purposes for which it is constructed there is nothing that can be regarded in law as a nuisance, for a plaintiff cannot complain of noises which he must reasonably expect and must to a considerable extent put up with, such as the noise of a piano. If, however, a defendant turns his house to unusual purposes, as, *e.g.*, by converting it into stables, then he must take care that it is so used as not to be a " substantial annoyance, detrimental to the comfort and to the value of the neighbours' property " (*p*).

But the law also takes into consideration both the object and duration of that which is said to constitute the nuisance. Thus, on the one hand, a mere temporary inconvenience caused by the execution of lawful works in the ordinary user of land (as *e.g.*, dust and noise caused by rebuilding operations) does not constitute a

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(*i*) *Fleming* v. *Hislop*, 11 A. C., at p. 697.

(*k*) *Colls* v. *Home & Colonial Stores, Ltd.*, [1904] A. C., at p. 209; 73 L. J. Ch. 484; 90 L. T. 687; 20 T. L. R. 475.

(*l*) *Sturges* v. *Bridgman*, 11 Ch. D., at p. 865; 48 L. J. Ch. 785; 41 L. T. 219. " What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." See also *Polsue* v. *Rushmer* (*ante*, p. 554, n. (*l*)).

(*m*) *Colls* v. *Home and Colonial Stores*, [1904] A. C., at p. 185, *supra*.

(*n*) *Ball* v. *Ray*, L. R. 8 Ch., at p. 469; 28 L. T. 346.

(*o*) *Cavey* v. *Ledbitter*, 13 C. B. (N.S.), at p. 476; 32 L. J. C. P. 104; 6 L. T. 721; 134 R. R. 610.

(*p*) *Ball* v. *Ray* (*ubi supra*); or, in other words, " substantial interference with [the neighbour's] comfortable and profitable enjoyment of his dwelling-house, or warehouse, or place of business, as the case may be " (*Kine* v. *Jolly*, [1903] 1 Ch., at p. 489; 74 L. J. Ch. 174).

nuisance (*q*). On the other hand, noise made deliberately and maliciously for the purpose of annoying a neighbour may amount to a nuisance. Thus, in the case of *Christie* v. *Davey*, the plaintiff was a teacher of music and singing, the noise of which annoyed the defendant, who, in consequence, wrote an exaggerated letter of complaint to the plaintiff, and on receiving no answer, began to make a series of offensive noises in his own house—such as beating on trays, whistling and shrieking—whenever the playing of music was going on in the plaintiff's house. The plaintiff accordingly brought an action for an injunction to restrain the defendant from making those noises, upon which the defendant counterclaimed for an injunction to restrain the plaintiff from giving music lessons. It was held (i) that, upon the facts, nothing done by the plaintiff had gone beyond a legitimate use of his house so as to amount to a nuisance, but (ii) that the noises made by the defendant were not legitimate and that an injunction must be granted to restrain him from making such noises so as to vex or annoy the plaintiff (*r*).

2. In the second class of cases, a very different consideration arises. The principle that persons living in society must submit to that amount of discomfort and annoyance which is caused by the legitimate user of their neighbours' property, does not apply to circumstances the result of which is injury to their own property (*s*). If a defendant so uses his property as to cause actual injury or damage to the plaintiff's property, the question of legitimate user does not arise; the only question being, Does he injure the plaintiff? (*t*). But, in order to establish his case

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(*q*) *Harrison* v. *Southwark, etc., Water Co.*, [1891] 2 Ch., at pp. 413, 414; 60 L. J. Ch. 630; 64 L. T. 864. Compare the similar rule as to public nuisances, *ante*, p. 555.

(*r*) [1893] 1 Ch. 316; 62 L. J. Ch. 439. It was, however, suggested by the Court that the playing in the plaintiff's house should cease at 11 p.m., or as soon as possible afterwards.

(*s*) *St. Helens Smelting Co.* v. *Tipping*, 11 H. L. C., at p. 650; 35 L. J. Q. B. 66; 12 L. T. 776.

(*t*) *Reinhardt* v. *Mentasti*, 42 Ch. D. 685; 58 L. J. Ch. 787; 61 L. T. 328 (damage caused by a stove in the defendant's house, which rendered the cellar of the house of the plaintiff, a hotel-keeper, unfit for storing wine). Other instances are *Ballard* v. *Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454; 52 L. T. 942 (injury to the plaintiff's well by the escape of sewage from the defendant's land); *Smith* v. *Giddy*, [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296; 20 T. L. R. 596 (damage to the plaintiff's crops through the overhanging trees of the defendant).

the plaintiff must show that he has suffered damage which is (i) substantial, *i.e.*, such as does not depend upon minute scientific tests, but "can be shown by a plain witness to a plain common juryman"; and (ii) which is actual and not merely "contingent, prospective or remote" (*u*).

Who may sue and be sued for a nuisance.—The right to sue in respect of a public nuisance has already been discussed (*x*). For a private nuisance, as for a trespass, an action can be maintained by any one in possession of the land or premises whose enjoyment is affected by the nuisance, however small his interest (*y*), but not by a mere licensee (*z*). A reversioner can, however, sue in respect of a nuisance which causes injury of a permanent character but not in respect of a temporary nuisance (*a*).

A person is liable in respect of a nuisance if he or any one for whom he is responsible, has created or caused it, or if he has authorised or permitted its continuance, or if, in case of a public nuisance, he has neglected to abate it for an undue time after it became, or, if he had used reasonable care, ought to have become, aware of it, even if it was caused by a stranger without his assent (*b*). Accordingly, *as between landlord and tenant*, the

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(*u*) *Salvin* v. *North Brancepeth Coal Co.*, 9 Ch. 705; 44 L. J. Ch. 149; 31 L. T. 154. And, where the defendant does something which is not in itself noxious and would not injure any ordinary trade or property, he is not liable as for a nuisance because he causes injury to something which is peculiarly sensitive (*Robinson* v. *Kilvert*, 41 Ch. D. 88; 58 L. J. Ch. 392; 61 L. T. 60).

(*x*) *Ante*, p. 552.

(*y*) See *Jones* v. *Chappell*, L. R. 20 Eq. 539; 44 L. J. Ch. 658.

(*z*) *Malone* v. *Laskey*, [1907] 2 K. B. 141; 76 L. J. K. B. 1134; 97 L. T. 324; 23 T. L. R. 399.

(*a*) *Simpson* v. *Savage*, 1 C. B. (N.S.) 347; 26 L. J. C. P. 50; 107 R. R. 688; *Mumford* v. *Oxford, etc., Railway Co.*, 1 H. & N. 34; 25 L. J. Ex. 265; 108 R. R. 439; *Jones* v. *Llanrwst Urban District Council*, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 105 L. T. 751; 27 T. L. R. 133; *White* v. *London General Omnibus Co.*, [1914] W. N. 78.

(*b*) *Att.-Gen.* v. *Tod Heatley*, [1897] 1 Ch. 560; 66 L. J. Ch. 275; 76 L. T. 174; *Barker* v. *Herbert*, [1911] 2 K. B., at pp. 636, 637; 80 L. J. K. B. 1329; 105 L. T. 349; 27 T. L. R. 488. In this last case, the owner of a vacant house was held not liable in respect of a nuisance caused by trespassers who broke away the railings of the area of the house, he not being aware of what had been done and sufficient time not having elapsed for him to have found out, if he had used reasonable care. Compare *Hudson* v. *Bray*, [1917] 1 K. B. 520; 86 L. J. K. B. 576; 116 L. T. 122; 33 T. L. R. 118, where a tree standing on the defendant's land was blown down by a gale and fell across the highway, and it was held that the defendant was under no duty to light it at night or to warn persons passing along the highway of its existence.

question is whether the nuisance is the result of a wrongful act by the landlord or the tenant (*c*). The tenant is *prima facie* liable (*d*), and, if the nuisance is due entirely to his default, as *e.g.*, to his failure to clear drains (*e*) is solely liable. But, both in the case of public and private nuisances, the landlord is liable if the nuisance is the result of any wrongful act on his part, as, for example, if he has let the premises with an existing nuisance, or has relet them after the user by the tenant has created a nuisance (*f*), or has let them for purposes necessarily involving the creation of a nuisance (*g*), or if the nuisance is due to want of repairs which, as between himself and the tenant, he was bound to execute (*h*).

SECTION 2.—*Interference with Easements and Natural Rights.*

An easement is a right which the owner of one tenement (termed the dominant tenement) has acquired over another

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But under s. 72 of the Highways Act, 1835, the defendant might apparently have been liable, if, having been called upon by the surveyor of highways to remove the obstruction, he had failed to do so (*Id.* and see *Gully* v. *Smith*, 12 Q. B. D. 121; 53 L. J. M. C. 25). Compare also *Noble* v. *Harrison*, [1926] 2 K. B. 332; 95 L. J. K. B. 813; 135 L. T. 325; 42 T. L. R. 518. Here a branch of a tree on the defendant's land overhung a highway at about thirty feet from the ground. Owing to a latent defect not discoverable by any reasonably careful inspection, the bough broke and fell upon the plaintiff's car while passing along the highway. Held, (i) that since there was no interference with the use of the highway the tree was not, merely because it overhung, a public nuisance; (ii) that the defendant was not liable since he had neither created the danger, nor had any actual knowledge of the danger, nor (distinguishing *Tarry* v. *Ashton*, *ante*, p. 526) was it a case in which knowledge of the danger ought to be imputed to him. In the case of a *private nuisance*, the occupier of land on which it exists is not liable for a mere omission to abate it if he has neither created it nor consented to its continuance (*Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K. B. 341; 93 L. J. K. B. 261; 130 L. T. 522; 40 T. L. R. 88).

(*c*) *Pretty* v. *Bickmore*, L. R. 8 C. P., at p. 405; 28 L. T. 704.

(*d*) *Payne* v. *Rogers*, 2 H. Bl. 349; 3 R. R. 415; *Hadley* v. *Taylor*, L. R. 1 C. P. 53; 13 L. T. 368; *Nelson* v. *Liverpool Brewery Co.*, 2 C. P. D. 311; 46 L. J. C. P. 675.

(*e*) *Russell* v. *Shenton*, 3 Q. B. 449; 11 L. J. Q. B. 289; 61 R. R. 249.

(*f*) *Todd* v. *Flight*, 9 C. B. (N.S.) 377; 30 L. J. C. P. 21; 3 L. T. 325; 127 R. R. 684. The mere continuance of a tenancy does not amount to a re-letting (*Bowen* v. *Anderson*, [1894] 1 Q. B. 161).

(*g*) *Harris* v. *James*, 45 L. J. Q. B. 544. *Secus* where the nuisance is due to an unnecessary and improper use of the premises by the tenant (*Rich* v. *Basterfield*, 4 C. B. 783; 16 L. J. C. P. 273; 72 R. R. 716; *Rainham, etc., Works* v. *Belvedere Co.*, [1921] 2 H. C., at p. 489; 90 L. J. K. B. 1252; 37 T. L. R. 973).

(*h*) *Payne* v. *Rogers* (*ubi supra*); *Todd* v. *Flight* (*ubi supra*); *Nelson* v. *Liverpool Brewery Co.* (*ubi supra*).

(termed the servient) tenement. It is a right enjoyed by the owner of the dominant tenement in respect of that tenement to which it is appendant, and is a right whereby he is entitled to do some act upon the servient tenement, as in the case of a private right of way, or to compel the owner of the servient tenement to refrain from using it in a particular manner, as, *e.g.*, from obstructing access of light to the dominant tenement. It is a right additional to the ordinary rights of ownership and can be acquired only by prescription or grant: in this respect it differs from natural rights incident to ownership, such as the ordinary rights of riparian proprietors, which belong to them by virtue of their ownership of the land through which the stream flows. The only easements and natural rights that we shall now discuss are those in respect of (1) water; (2) support for land and buildings; (3) light and air. Any wrongful interference with the enjoyment of these constitutes a tort in the nature of a nuisance.

1. **Water.**—In the case of a *natural stream* flowing in a defined channel, whether subterranean or on the surface, every riparian proprietor has *jure naturæ*, as incident to his property in the land through which it flows, a right, not to the flow of all the water in its natural state, but only "to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side" (*i*). This right, though limited in extent, is absolute in its nature, and for any infringement an action will lie without proof of pecuniary damage (*j*); whether it has been infringed is entirely a question of degree: "all that the law requires of the party by or over whose land a stream passes is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish

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(*i*) *Embrey* v. *Owen*, 6 Ex. 353, 368; 20 L. J. Ex. 212; 86 R. R. 331. See also *Dickinson* v. *Grand Junction Canal Co.*, 7 Ex. 282; 21 L. J. Ex. 241; *Broadbent* v. *Ramsbotham*, 11 Ex. 602; 25 L. J. Ex. 115; 105 R. R. 673; *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 626; 26 L. J. Ex. 146; 108 R. R. 752 (water flowing in a defined channel from a spring).

(*j*) *Embrey* v. *Owen* (*ubi supra*); *Sampson* v. *Hoddinot*, 1 C. B. (N.S.) at p. 611; 26 L. J. C. P. 148; 107 R. R. 809; *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B., at p. 311; 64 L. J. Q. B. 207; 71 L. T. 777; *Stollmeyer* v. *Trinidad, etc., Petroleum Co.*, [1918] A. C., at p. 497; 87 L. J. P. C. 77; 118 L. T. 514. And for the violation of this right an injunction is a proper remedy ([1918] A. C., at p. 497).

or affect the application of the water by the proprietors above or below on the stream" (*k*). "Every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for domestic purposes and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further than this, he has the right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this, he may dam up a stream for the purpose of a mill or divert the water for the purpose of navigation" (*l*). If, however, a riparian proprietor takes water for extraordinary or secondary purposes, he is bound to return it to the stream "practically undiminished in volume and with its natural qualities unimpaired" (*m*). And a riparian proprietor has no right to pollute the water flowing by or through his land, and for such pollution an action lies without proof of any actual damage, as the pollution is in itself an *injuria* (*n*).

In addition to his natural rights a riparian owner may acquire further rights by prescription or grant, including even a right to foul a stream (*o*).

(*k*) *Embrey* v. *Owen*, 6 Ex., at pp. 370, 372; 20 L. J. Ex. 212; 86 R. R. 331.

(*l*) *Miner* v. *Gilmour*, 12 Moo. P. C., at p. 156; 124 R. R. 3; *John White & Sons* v. *J. & M. White*, [1906] A. C., at p. 80; 76 L. J. P. C. 14; 94 L. T. 64. But he has no right to use the water for purposes unconnected with his riparian tenement, *e.g.*, a railway company which owns a few yards of land on each side of a stream has no right to take water for the use of its engines on all parts of its line (*McCartney* v. *Londonderry, etc., Railway*, [1904] A. C. 301; 73 L. J. P. C. 73; 91 L. T. 105).

(*m*) *Young & Co.* v. *Bankier Distillery Co.*, [1893] A. C., at p. 696; 69 L. T. 838.

(*n*) *Wood* v. *Waud*, 3 Ex. 748; 18 L. J. Ex. 305; 77 R. R. 809; *Hodgkinson* v. *Ennor*, 4 B. & S. 229; 32 L. J. Q. B. 231; 129 R. R. 728; 8 L. T. 451; *Pennington* v. *Brinsop Hall Coal Co.*, 5 Ch. D. 769; 46 L. J. Ch. 773; 37 L. T. 149; *Jones* v. *Llanrwst Urban District Council* (*ante*, p. 560, n. (*a*)). And even though the water is already polluted, any further pollution is a wrong (*Wood* v. *Waud, ubi supra*, and see *Att.-Gen.* v. *Leeds Corporation*, 5 Ch. 583; 39 L. J. Ch. 711).

(*o*) *Wood* v. *Waud* (*ubi supra*); *Sampson* v. *Hoddinot* (*ubi supra*). In such a case "the user which originated the right must also be its measure and it cannot be enlarged to the prejudice of any other person" (*Crossley & Sons, Ltd.* v. *Lightowler*, L. R. 2 Ch., at p. 481; 36 L. J. Ch. 584; 16 L. T. 438). Moreover, a progressive increase in the amount of pollution during the period

The right to the unpolluted and uninterrupted flow of water in an *artificial* watercourse can be acquired only by grant or prescription, but, when so acquired, it is of the same nature as the right in respect of a natural stream (*p*). The right to take water from a well is merely an easement (*q*).

A landowner has no rights in respect of water which percolates underground to his land in no known channel (*r*), or to common surface-water rising out of springy or boggy ground and flowing in no definite channel (*s*); if the person who owns the land through which the water percolates or from which it rises intercepts it or drains it off, "this inconvenience to his neighbour falls within the description of *damnum absque injuria*, which cannot become the ground of an action" (*t*). But underground water cannot be drained away so as to draw off water which has actually reached a defined surface channel (*u*). And the pollution of water percolating underground may amount to a nuisance (*x*).

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of user by virtue of which a prescriptive right is claimed "is destructive of that certainty and conformity essential for the measurement and determination of the user by which the extent of the prescriptive right is to be ascertained" (*Hulley* v. *Silversprings Bleaching Co.*, [1922] 2 Ch., at p. 281; 91 L. J. Ch. 207; 126 L. T. 499). And no prescriptive easement can be claimed to commit an act contrary to the provisions of the River Pollution Act, 1874, because a lost grant cannot be presumed where such a grant would have been in contravention of a statute (*Id.*).

(*p*) *Baily & Co.* v. *Clark, Son & Morland*, [1902] 1 Ch. 649; 71 L. J. Ch. 396; 86 L. T. 309 (reviewing the earlier authorities). In considering whether any right has been acquired, the matters to be taken into account are "first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been in fact used and enjoyed" ([1902] 1 Ch., at p. 668. Cp. *Whitmore's, Ltd.* v. *Stanford*, [1909] 1 Ch. 427; 78 L. J. Ch. 144; 99 L. T. 424; 25 T. L. R. 169); *Lewis* v. *Meredith*, [1913] 1 Ch. 571; 82 L. J. Ch. 255; 108 L. T. 549.

(*q*) *Race* v. *Ward*, 4 E. & B. 702; 24 L. J. Q. B. 153.

(*r*) *Chasemore* v. *Richards*, 7 H. L. C. 349; 29 L. J. Ex. 81; 115 R. R. 187. See *ante*, p. 7.

(*s*) *Rawstron* v. *Taylor*, 11 Ex. 369; 25 L. J. Ex. 33; 105 R. R. 567. See also *McNab* v. *Robertson*, [1897] A. C. 129; 66 L. J. P. C. 27; 75 L. T. 66. In the case of *Bradford Corporation* v. *Ferrand*, [1902] 2 Ch. 655; 71 L. J. Ch. 859; 87 L. T. 388, this principle was applied to underground water flowing in a defined but *unknown* channel.

(*t*) *Acton* v. *Blundell*, 12 M. & W., at p. 354; 13 L. J. Ex. 289; 67 R. R. 361.

(*u*) *Grand Junction Canal Co.* v. *Shugar*, 6 Ch. 483; 24 L. T. 402. For a further explanation of this case, see *Jordeson* v. *Sutton, etc., Gas Co.*, [1899] 2 Ch., at p. 251; 68 L. J. Ch. 457; 80 L. T. 815; and *English* v. *Metropolitan*

(*x*) See note (*x*), p. 565.

Support.—For land *unweighted by buildings* the owner has *jure naturæ* a right both to the lateral (*y*) and vertical (*z*) support of his neighbour's land. The right is not a right to have his neighbour's land remain in its natural state, but "a right to have the benefit of support, which is infringed as soon as, and not till, damage is sustained in consequence of the withdrawal of that support" (*a*). In *Darley Main Colliery Co.* v. *Mitchell* (*b*), which was a case of vertical support, the following rules were laid down:—

1. That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

2. That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right

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Water Board, [1907] 1 K. B. 588; 75 L. J. K. B. 361; 96 L. T. 573; 23 T. L. R. 138, where the defendants were held not liable for pumping operations which lowered the general water level so that part of the water flowing in a stream leaked out through the bed and side of the stream, the case of *Grand Junction Canal Co.* v. *Shugar* being distinguished as one in which there was "direct tapping of an overground stream flowing in a defined channel, and not merely percolating water indirectly affecting the surface stream."

(*x*) *Ballard* v. *Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454; *ante*, p. 559, n. (*t*).

(*y*) *Wyatt* v. *Harrison*, 3 B. & Ad. 871; 1 L. J. K. B. 237; 37 R. R. 566; *Gayford* v. *Nicholls*, 9 Ex. 702; 23 L. J. Ex. 205; 96 R. R. 925.

(*z*) *Humphries* v. *Brogden*, 12 Q. B. 739; 20 L. J. Q. B. 10; 76 R. R. 402. "In all cases where there has been a severance in title and the upper and lower strata are in different hands, the surface owner is entitled as of common right to support for his property in its natural position and in its natural condition without interference or disturbance by, or in consequence of, mining operations, unless such interference or disturbance is authorized by the instrument of severance either in express terms or by necessary implication" (*Butterknowle Colliery Co.* v. *Bishop Auckland, etc., Co.*, [1906] A. C., at p. 313; 75 L. J. Ch. 541; 94 L. T. 795; 22 T. L. R. 516).

(*a*) *Dalton* v. *Angus*, 6 A. C., at p. 808; 50 L. J. Q. B. 689; 44 L. T. 844. Proof of pecuniary loss is not necessary (*Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B., at pp. 311—313; 64 L. J. Q. B. 207; 71 L. T. 777).

(*b*) 11 A. C., at p. 147; 55 L. J. Q. B. 529; 54 L. T. 882. Each subsidence is therefore a fresh cause of action, and the Statute of Limitations runs from the date of the subsidence, not the date of the excavation (*id.*). And damages cannot be claimed in respect of the risk of future subsidence (*West Leigh Colliery Co.* v. *Tunnicliffe & Hampson, Ltd.*, [1908] A. C. 27; 77 L. J. Ch. 102; 98 L. T. 4). No duty to prevent subsidence rests on a person who has not taken any part in the excavation, and therefore the owner of minerals is not liable for a subsidence occasioned by the acts of his predecessor but occurring after he came into possession (*Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493; 69 L. J. Ch. 571; 82 L. T. 380).

so as not to disturb the lawful enjoyment of the owner of the surface.

3. That the excavation and removal of the minerals does not, *per se*, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface.

4. But that, when in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface and constitutes his cause of action (*b*).

In respect of *buildings* the right to support is an easement which can be acquired only by prescription or grant, though, when gained, it is the same in nature and extent as the natural right to the support of land (*c*). The right of support to buildings can be gained not only from land but also from adjoining buildings (*d*).

And, though there is no right of support for buildings, but only for land, yet "on proof that the weight of a newly erected house has not contributed to the subsidence, its value may be recovered by way of damage consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land" (*e*).

Since a landowner has no rights over percolating underground water, he has no right of support from such water: he has, therefore, no right of action if his land subsides because the subjacent water is drawn away by drainage operations upon his neighbour's land (*f*). But this rule applies only to water, and not where the plaintiff is deprived of support through operations upon

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(*b*) But see s. 2 (1) of the Mines (Working Facilities, etc.) Act, 1923.

(*c*) *Dalton* v. *Angus* (*ubi supra*). The right to such support is acquired by twenty years' enjoyment without interruption if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the building (*id.*). See also *Birmingham Corporation* v. *Allen*, 6 Ch. D., at p. 292; 46 L. J. Ch. 673; 37 L. T. 207. Where land is granted for the purpose of enabling a house to be built upon it a grant of the right of support will also be implied (*Rigby* v. *Bennett*, 21 Ch. D. 559; 48 L. T. 47).

(*d*) *Lemaitre* v. *Davis*, 19 Ch. D. 281; 51 L. J. Ch. 173; 46 L. T. 407.

(*e*) *Att.-Gen.* v. *Conduit Colliery Co.*, [1895] 1 Q. B., at p. 312; 64 L. J. Q. B. 207; 71 L. T. 777, citing *Brown* v. *Robins*, 4 H. & N. 186; 28 L. J. Ex. 250; 118 R. R. 382; *Hamer* v. *Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102; 123 R. R. 622.

(*f*) *Popplewell* v. *Hodkinson*, L. R. 4 Ex. 248; 38 L. J. Ex. 126; 20 L. T. 578.

adjoining land which withdraw from his land subterranean silt (*g*) or pitch (*h*).

Light and Air.—The right to the access of *light* to the windows of a house over another person's land is an easement which can be acquired only by grant or prescription. In this respect it differs from the right to freedom from smell and noise, which is a right *ab initio* incident to the right of property. But the nature of the right is in each case the same, and a plaintiff has not in either case a right of action unless there has been some "substantial interference with his comfortable use and enjoyment of his house, according to the usages of ordinary persons in that locality." A person cannot by prescription acquire a right to all the light that comes through his windows, and, if the light is obstructed, he has a right of action only when so much has been taken as to cause a nuisance. "The test of nuisance is not—How much light has been taken, and is that enough materially to lessen the enjoyment and use of the house that its owner previously had? but—How much is left, and is that enough for the comfortable use and enjoyment of the house?" (*i*).

The right to the access of *air* can also be acquired only by grant or prescription (*k*). But it can be acquired only in respect of the access of air through some defined channel or aperture (*l*).

(*g*) *Jordeson* v. *Sutton, etc., Gas Co.*, [1899] 2 Ch. 217; 68 L. J. Ch. 457; 80 L. T. 815.

(*h*) *Trinidad Asphalt Co.* v. *Ambard*, [1899] A. C. 594; 68 L. J. P. C. 114; 81 L. T. 132. Where a man puts down a shaft in his own land for the purpose of pumping brine, his act is not unlawful merely because the brine so obtained may be the result of a dissolution of rock in his neighbour's property (*Salt Union, Ltd.* v. *Brunner, Mond & Co.*, [1906] 2 K. B. 822; 76 L. J. K. B. 55; 95 L. T. 647; 22 T. L. R. 835).

(*i*) The above paragraph is a summary of the judgment in *Higgins* v. *Betts*, [1905] 2 Ch. 210; 74 L. J. Ch. 621; 92 L. T. 850; 21 T. L. R. 552, explaining the leading case of *Colls* v. *Home and Colonial Stores*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687; 20 T. L. R. 205, by which the rule as above stated was settled by the House of Lords. See also *Kine* v. *Jolly*, [1907] A. C. 1; 76 L. J. Ch. 1; 95 L. T. 656; 23 T. L. R. 1 (where the rule was re-affirmed by the House of Lords); *Semon & Co.* v. *Bradford Corporation*, [1922] 2 Ch. 737; 91 L. J. Ch. 602; 127 L. T. 800. There can be no prescriptive right to light passing through an ordinary *doorway* when it is open (*Levet* v. *Gas Light, etc., Co.*, [1919] 1 Ch. 24; 88 L. J. Ch. 12; 119 L. T. 761).

(*k*) *Cable* v. *Bryant*, [1908] 1 Ch. 259; 77 L. J. Ch. 78; 98 L. T. 98.

(*l*) *Webb* v. *Bird*, 13 C. B. (N.S.) 841; 31 L. J. C. P. 335; 134 R. R. 756; *Bryant* v. *Lefever*, 4 C. P. D. 172; 48 L. J. C. P. 380; 40 L. T. 579; *Bass* v. *Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574.

Section 3.—*Infringement of Patents, Copyrights, and Trade Marks* (*m*).

Patents, copyrights, and trade marks are incorporeal personal property and any wrongful interference with their enjoyment constitutes a tort in the nature of a nuisance.

Patents.—A "patent" is a franchise (*n*) arising from a grant by the Crown to a subject, by letters patent, of the exclusive privilege of making, using, exercising, and vending some new invention. The right of the Crown to make a grant of a franchise by letters patent is part of the royal prerogative, but its abuse by the grant of illegal monopolies over ordinary commodities led, in 1623, to the passing of the *Statute of Monopolies* (*o*), which declared illegal all monopolies for the sole buying, selling, making, or using anything within the realm except, by s. 6, "letters patent . . . for the term of fourteen years or under . . . of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent . . . shall not use." This exception is the foundation of patent law, which is now consolidated by the Patents and Designs Acts, 1907 and 1919 (*p*).

The *term* for which a patent may be granted is now *sixteen* years (*q*), which may be extended by the High Court for a further five or in exceptional cases ten years if the inventor has not been adequately remunerated (*r*).

Grant of a patent.—A patent can be granted only—

1. *To the true and first inventor*, either alone or jointly with any other person (*s*).

(*m*) For further details, see Williams' Personal Property, Part II., Chapter VII.

(*n*) *R.* v. *County Court Judge of Halifax*, [1891] 2 Q. B., at p. 266; 60 L. J. Q. B. 550; 65 L. T. 104. A trade mark is not a franchise (*Bow* v. *Hart*, [1905] 1 K. B., at p. 598; 74 L. J. K. B. 341; 92 L. T. 181; 21 T. L. R. 251).

(*o*) 21 Jac. 1, c. 3. The statute was declaratory of the Common Law.

(*p*) 7 Edw. 7, c. 29; 9 & 10 Geo. 5, c. 80. In the notes to this section these statutes will be referred to merely by their dates.

(*q*) S. 6 (1919).

(*r*) S. 7 (1919), amending s. 18 (1907).

(*s*) Ss. 1, 12 (1907); and see *Plimpton* v. *Malcolmson*, 3 Ch. D. 531; 45 L. J. Ch. 505; 34 L. T. 340.

2. *For an invention*, that is to say, for some article or process (*t*): a patent cannot be granted for a mere principle or for the discovery of a natural law (*u*).

3. *Which is new within the realm, i.e.*, which has not been published within the realm (*x*) by prior user in public (*y*), or by books or documents (*z*), or by communication to persons not bound to secrecy (*a*).

4. *And useful.*—An invention must be useful, though that word is not found in the statute (*b*). But a very small utility is sufficient, and the invention need not be commercially profitable at the time of the grant; it is useful if it enables the public to do

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(*t*) See *Badische Anilin und Soda Fabrik* v. *Levinstein*, 12 A. C. 710; 57 L. T. 853; 52 L. J. Ch. 704.

(*u*) *Patterson* v. *Gas Light and Coke Co.*, 2 Ch. D. 812; 45 L. J. Ch. 843; 35 L. T. 11. "A patentee must make some addition, not only to knowledge, but to previously known inventions and must . . . produce either a new and useful thing or result, or a new and useful method of producing an old thing or result": *Lane Fox* v. *Kensington, etc., Electric Lighting Co.*, [1892] 3 Ch., at p. 429; 67 L. T. 440.

(*x*) *Plimpton* v. *Malcolmson* (*ubi supra*). It may be new within the realm though it has been published abroad (*Rolls* v. *Isaacs*, 19 Ch. D. 268; 51 L. J. Ch. 170; 45 L. T. 704).

(*y*) *I.e.*, not *by* the public, but where the public could see (*Carpenter* v. *Smith*, 9 M. & W. 300; 11 L. J. Ex. 213; 60 R. R. 736).

(*z*) Provided that they were accessible to the public, or to some part of the public interested in the matter (*Plimpton* v. *Spiller*, 6 Ch. D. 412; 47 L. J. Ch. 211; 37 L. T. 56; *Harris* v. *Rothwell*, 35 Ch. D. 416; 56 L. J. Ch. 459; 56 L. T. 552). By s. 41 (1) (1907) an invention is not deemed to have been anticipated by reason of its publication in a specification over fifty years old, or in a provisional specification not followed by a complete specification. And by s. 41 (2) (1907) a patent is not invalid merely because the invention was published before the date of the patent, if the patentee proves to the satisfaction of the Court that the publication was made without his knowledge and consent and that the matter published was obtained from him, and, if he learnt of the publication before the date of his application for the patent, that he applied for and obtained protection for his invention with all reasonable diligence after learning of the publication; but by s. 13 (1919) this protection does not extend to a patentee who has commercially worked his invention in the United Kingdom otherwise than for reasonable trial prior to application for the patent. By s. 45 (1907), as amended by the Schedule (1919), the exhibition of an invention at an industrial or international exhibition, or the reading of a paper by an inventor before a learned society, or its publication in the society's transactions, does not prejudice his right to obtain a patent if he gives notice to the Comptroller of his intent so to exhibit, read or publish, and applies for the patent within six months after the exhibition, reading or publication.

(*a*) *Patterson* v. *Gas Light and Coke Co.*, 3 A. C., at p. 245; 47 L. J. Ch. 402; 38 L. T. 303.

(*b*) *Badische Anilin und Soda Fabrik* v. *Levinstein*, 12 A. C., at p. 712; 57 L. T. 853.

something which they could not do before or to do in a more advantageous manner what they could do before (*c*).

Application for a patent is made at the Patent Office, which is under the control of the Comptroller-General of Patents, Designs and Trade Marks, and must be accompanied by a provisional or complete specification. The application and specification are then referred to an examiner for report as to whether they satisfy the requirements of the Acts. If the application is then accepted notice is given to the applicant, who then has provisional protection. If the complete specification is not left with the application it must be left within nine months afterwards, or such further time, not exceeding one month, as the Comptroller may allow, otherwise the application is deemed to be abandoned. When the complete specification is left the examiner must also make certain investigations to ascertain whether the invention has been claimed in any specification (other than a provisional specification not followed by a complete specification) published within fifty years before the date of the application or published on or after the date of the application and deposited pursuant to a prior application. Acceptance of the complete specification is advertised by the Comptroller, and the application and specifications are open to public inspection, the applicant having thenceforth the same rights as if the patent had been granted, except that he cannot yet take any proceedings for infringement. During the next two months, however, any person may oppose the grant upon certain grounds of opposition specified in the Acts. If there is no opposition or if it fails, the patent is granted and sealed with the seal of the Patent Office (*d*).

(*c*) *Welsbach Incandescent Gas Light Co.* v. *New Incandescent Gas Lighting Co.*, [1900] 1 Ch. 843; 69 L. J. Ch. 342; 82 L. T. 293; 16 T. L. R. 205.

(*d*) Ss. 1—12 (1907); s. 4 and Schedule (1919). The chief grounds on which a person may oppose are: (i) that the applicant obtained the invention from him or from a person of whom he is the legal personal representative; (ii) that the invention has, within the fifty years before the date of the application, been published in any complete specification or in any provisional specification followed by a complete specification, or has been made available to the public in any document (other than a British specification) published in the United Kingdom, prior to the application; (iii) that the invention has been claimed in any complete specification deposited pursuant to an application for a patent which is or will be of prior date to the patent the grant of which is opposed; (iv) that the nature of the invention is not sufficiently or fairly described; (v) that the complete specification claims an invention which is different from that claimed by the provisional specification,

Infringement.—The patent gives the patentee or patentees the right to exclude others from making, using, and selling the invention within the realm (*e*), and to do any of these things without a licence from him or them is an infringement. Joint patentees are joint tenants, but, subject to any contrary agreement, each can use the invention for his own profit without accounting to the others, but cannot grant a licence without their consent (*f*).

Remedies.—In an action for infringement of a patent the plaintiff is entitled to relief by way of injunction and damages, but *not* to an account of profits, but, subject as aforesaid, the Court may make such order for an injunction, inspection or account, and impose such terms and give such directions as it may think fit (*g*). No damages can, however, be claimed from a defendant who proves that, at the date of the infringement, he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the marking of an article with the word " patent," " patented," or any word or words expressing or implying that a patent has been obtained for the article, shall not be deemed to constitute notice of the existence of the patent unless such word or words are accompanied by the year and number of the patent (*h*). The defendant may not only deny the infringement, but may set up as a defence the invalidity of the patent or may counterclaim for its revocation (*i*). If in an action

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and that such invention forms the subject of an application made by the opponent between the leaving of the provisional and the complete specification [s. 11 (1907); s. 4 (1919)].

(*e*) *Steers* v. *Rogers*, [1893] A. C., at p. 235; 62 L. J. Ch. 671; 68 L. T. 726.

(*f*) S. 37 (1907). A patent has the same effect against the Crown as against a subject, but provisions are made for enabling Government departments to make or use an invention on such terms as may be agreed or, in default of agreement, may be settled as provided by the Act [s. 8 (1919)].

(*g*) S. 34 (1907), as amended by s. 10 (1919).

(*h*) S. 33 (1907).

(*i*) Ss. 25, 32 (1907). A patent may also be *revoked*—(1) By the Comptroller, within two years from its grant on the application of any person who would have been entitled to oppose the grant and on any grounds on which it might have been opposed [s. 26 (1907)]; (2) By the Comptroller, under s. 1 (1919) if the monopoly rights are abused (*post*, p. 573); (3) By the Court, on petition (i) by the Attorney-General or any person authorised by him; (ii) by any person alleging that the patent was obtained in fraud of him or some person through whom he claims, *or* that he or any such person was the true inventor, *or* that he or any person through whom he claims an interest in any trade, business, or manufacture had publicly manufactured, used or sold the invention within the realm before the date of the patent [s. 25 (1907).]

for infringement the Court finds that any one or more of the claims in the specification is valid, it may give relief in respect of any of such claims which are infringed without regard to the invalidity of any other claim (*k*).

In an action for infringement of a patent the Court may certify that the validity of any claim in the specification came in question, and, if the Court so certifies, the plaintiff, on obtaining judgment in any subsequent action for infringement of such claim, will have costs as between solicitor and client, unless the Court trying the subsequent action otherwise directs (*l*).

Where a person claiming to have an interest in a patent, by circulars, advertisements or otherwise, threatens any other person with legal proceedings for an alleged infringement, any person aggrieved thereby may obtain an injunction against the continuance of such threats and recover any damage that he has sustained thereby if the alleged infringement was not in fact an infringement. But this section does not apply if an action for infringement is commenced and prosecuted with due diligence (*m*).

Assignment.—Letters patent are assignable, and the assignment gives to the assignee all the rights of the assignor. In order to give the assignee a legal title and to enable him to sue in his own name for an infringement the assignment must be by deed, but a valid equitable assignment may be made without deed (*n*).

Licences.—The patentee may grant a licence to use the

Where a patent has been revoked by the Court on the ground that it was obtained in fraud of the true and first inventor, or where the grant has been revoked by the Comptroller under s. 26 (1907), or refused on opposition by a person claiming that the applicant obtained the invention from him or from a person of whom he is the legal personal representative (*ante*, p. 570), the Comptroller may, on the application of the true inventor, grant him a patent for the whole or any part of the invention, in lieu of and bearing the same date as the patent revoked or the date which it would have borne if the patent had not been refused; but no action can be brought for any infringement of the patent so granted committed before the actual date of the grant [s. 15 (1907) and Schedule (1919)].

(*k*) S. 9 (1919).

(*l*) S. 35 (1907); Schedule (1919).

(*m*) S. 36 (1907); Schedule (1919). This section presupposes the existence of a patent and does not apply to a threat by a person who, although his complete specification has been accepted, has not a patent (*Ellis & Sons* v. *Pogson*, [1923] 2 Ch. 496; 129 L. T. 524; 92 L. J. Ch. 221).

(*n*) *Re Casey's Patents*, [1892] 1 Ch. 104; 65 L. T. 40; 61 L. J. Ch. 61.

invention, but (subject to the exception mentioned below), even the grant of an exclusive licence does not enable the licensee to sue in his own name for infringement (*o*). At any time after the sealing of a patent the Comptroller must, if the patentee so requests, cause the patent to be indorsed with the words "licences of right," and thereupon any person shall at any time thereafter be entitled as of right to a licence upon such terms as, in default of agreement, may be settled by the Comptroller on the application of either the patentee or the applicant (*p*). Where any person alleges that the monopoly rights under a patent have been abused and establishes such abuse, the Comptroller (i) may order the patent to be indorsed with the words "licences of right," in which case every existing licensee may surrender his licence for a licence to be settled by the Comptroller, in the same manner as if the patent had been so indorsed at the request of the patentee; or (ii) may order the grant to the applicant of a licence on such terms as the Comptroller may think expedient, *when such a licensee may institute proceedings for infringement in his own name* (making the patentee a defendant) if the patentee refuses or neglects to take such proceedings within two months after being called upon to do so (*q*).

Register of patents.—All assignments and licences must be entered in the register, which is open to the public, and in which are also entered the names and addresses of all patentees. No notice of a trust can be entered on the register, and, subject to any rights which appear from the register to be vested in any other person, the registered proprietor has power absolutely to assign, grant licences as to, or otherwise deal with, the patent;

(*o*) *Heap* v. *Hartley*, 42 Ch. D. 461; 58 L. J. Ch. 790; 61 L. T. 538.

(*p*) S. 2 (1919).

(*q*) S. 1 (1919). Other powers are also given by this section to the Comptroller, including a power to order a grant to the applicant or some other person, and a power to revoke the patent if the objects of the section cannot be obtained by any of the powers therein given. The monopoly rights are deemed to have been abused in the following cases, *inter alia*, namely (i) where, after four years from the date of the patent the invention is not being worked on a commercial scale in the United Kingdom and no satisfactory reason for this is given; (ii) where the demand for the patented article in the United Kingdom is not being met to an adequate extent and on reasonable terms; (iii) where the patentee has refused to grant licences on reasonable terms, so that trade is prejudiced, and it is in the public interest that licences should be granted.

but any equities in respect of a patent may be enforced in the same manner as in respect of any other personal estate (*r*).

Copyright.—The law on this subject is now regulated by the *Copyright Act*, 1911 (*s*), which repealed all previous legislation (*t*) on the subject and abrogated all existing Common Law rights. But the Act does not apply to copyright in designs capable of being registered under the Patents and Designs Act, 1907, except when such designs are not used or intended to be used as models or patterns to be multiplied by any industrial process (*u*). The Act provides that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, except under the provisions of the Copyright Act, 1911, or any other statute for the time being in force; but this is not to abrogate any right or jurisdiction to restrain a breach of trust or confidence (*x*). Thus, all copyright at Common Law has ceased to exist. The universities and colleges named in the Copyright Act, 1775 (now repealed) retain any copyright they possessed under that Act on July 1, 1912, but their remedies are to be those only under the new Act (*y*). Rights existing at the commencement of the 1911 Act are terminated, and instead thereof a person entitled to copyright in any work other than a dramatic or musical work, acquires copyright under the Act; and as to musical and dramatic works a person entitled to both copyright and performing right acquires copyright under the Act, and if entitled to copyright but not performing right acquires copyright under the Act, but without the sole right to perform in public, and if entitled to performing right but not copyright acquires simply the sole right to perform in public (*z*).

(*r*) Ss. 28, 66, 67 and 71 (1907); s. 16 (1919).

(*s*) 1 & 2 Geo. 5, c. 46, as modified by the Copyright (British Museum) Act, 1915, with respect to the delivery of books to the British Museum.

(*t*) Except the penal sections of the Fine Arts Copyright Act, 1862, the Musical (Summary Proceedings) Copyright Act, 1902, and the Musical Copyright Act, 1906; *id.*, s. 11 (2).

(*u*) S. 22. See *post*, p. 580. Unless otherwise stated, the remaining references in this section are to the Copyright Act, 1911.

(*x*) S. 31.

(*y*) S. 33.

(*z*) S. 24 and First Schedule. But the author of an article first published in a magazine, review or other periodical, retains the right of separate

Definition of copyright.—Copyright is defined (*a*) as "the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and it includes the sole right—(i) to produce, reproduce, perform, or publish any translation of the work, (ii) in the case of a dramatic work, to convert it into a novel or other non-dramatic work, (iii) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work by way of performance in public or otherwise, (iv) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; and it includes the sole right to authorise (*aa*) any such acts as aforesaid."

Publication of a work means the issue of copies to the public; but does not include the performance in public of a dramatic or musical work, public delivery of a lecture, public exhibition of an artistic work, or construction of an architectural work of art, and the issue of photographs and engravings of works of sculpture and architectural works of art is not to be deemed publication of such works (*b*). Except for purposes of infringement, a work is not to be deemed to be published or performed in public or a lecture delivered in public, if this is done without consent of the author or his executors, administrators, or assigns (*c*).

Area and subject-matter.—Copyright (*d*) subsists, throughout those parts of His Majesty's dominions to which the Act extends (*dd*), in every original literary, dramatic, musical, and

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publication after twenty-eight years, to which he was entitled under s. 18 of the Copyright Act, 1842 (First Schedule). And by s. 24 special provisions are made for cases in which, before the Act, the author had assigned the copyright or any interest therein for its whole term.

(*a*) S. 1 (2).

(*aa*) As to the meaning of the word "authorise," see *Performing Right Society* v. *Ciryl, etc., Syndicate*, [1924] 1 K. B. 1; 92 L. J. K. B. 811; 129 L. T. 653.

(*b*) S. 1 (3).

(*c*) S. 35 (2).

(*d*) S. 1 (1).

(*dd*) See ss. 25-28, 35 (1), and 37.

artistic work (*e*) if—(i) in the case of a published work, it was first published within those parts of such dominions, and (ii) in the case of an unpublished work, the author was at the date of the making (*f*) of the work a British subject or resident (*g*) within those parts of such dominions; but in no other works except so far as the protection conferred by the Act is extended by Orders in Council to self-governing dominions to which the Act does not extend, and to foreign countries (*h*).

Duration of copyright.—Copyright under the Act is usually for the life of the author and fifty years after his death (*i*). But at the end of twenty-five years (or if copyright existed at the passing of the 1911 Act, thirty years) from the death of the author (*k*) of a published work, it is not an infringement to reproduce the work for sale on giving the prescribed notice to the owner of the copyright and paying to or for his benefit a royalty of ten per cent. on the published price of each copy sold (*i*). And after the death of the author (*k*) of a literary, dramatic or musical work which has been published or performed in public, on petition to the Privy Council an order may be obtained for a compulsory licence to reproduce or perform the work if it would otherwise be withheld from the public (*l*). Copyright in the case of joint authors lasts for the life of the one who dies first and (whichever is longer) another fifty years or the life of the one who dies last (*m*). Copyright in a literary,

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(*e*) See the definitions in s. 35 (1). The words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high (*University of London Press, Ltd.* v. *University Tutorial Press, Ltd.*, [1916] 2 Ch., at p. 608; 86 L. J. Ch. 107; 115 L. T. 301; 32 T. L. R. 698) as for instance, examination papers (*id.*), or a telegraphic code (*Anderson & Co.* v. *Lieber Code Co.*, [1917] 2 K. B. 464; 86 L. J. K. B. 1220; 117 L. T. 361; 33 T. L. R. 420), or a letter written by a manufacturer to a trade customer offering him goods on special terms (*British Oxygen Co.* v. *Liquid Air Co.*, [1925] Ch. 383; 95 L. J. Ch. 81; 133 L. T. 202. See also *British Broadcasting Co.* v. *Wireless League, etc., Publishing Co.*, [1926] 1 Ch. 433; 95 L. J. Ch. 272; 135 L. T. 93; 42 T. L. R. 370. No copyright can exist in a work which is of an obscene or immoral character (*Baschet* v. *London, etc., Co.*, [1900] 1 Ch. 73; 69 L. J. Ch. 35; 81 L. T. 509; *Glyn* v. *Weston, etc., Film Co.*, [1916] 1 Ch. 261; 35 L. J. Ch. 261; 114 L. T. 354; 32 T. L. R. 235).

(*f*) See s. 35 (4).

(*g*) If so domiciled, he is to be deemed resident, s. 35 (5).

(*h*) See ss. 25—30 and 32.

(*i*) S. 3.

(*k*) As to joint authors, see s. 16 (1).

(*l*) S. 4.

(*m*) S. 16.

dramatic, or musical work, or an engraving, which is published posthumously, exists until publication or performance in public and for fifty years after (*n*). Copyright in government publications lasts for fifty years from first publication (*o*); and in mechanical contrivances for reproduction of sound, for fifty years from the making of the original plate (*p*); and in photographs, for fifty years from the making of the original negative (*q*).

Ownership of copyright.—The author of a work is usually the first owner of the copyright therein (*r*). But where the plate or other original of an engraving, photograph, or portrait was made to the order of some other person for valuable consideration, such other person, in the absence of any agreement to the contrary, is the first owner of the copyright (*s*); and where the author was in the employment of some other person and the work was made in the course of such employment, the employer is (unless otherwise agreed) the first owner of the copyright, though where the work is an article or other contribution to a newspaper, magazine, or similar periodical, the author can (unless otherwise agreed) restrain publication except as part of a newspaper, magazine, or similar periodical (*t*). The author of a photograph is the owner of the original negative (*u*), and the author of a mechanical contrivance for reproducing sound is the owner of the original plate when it was made (*x*).

Assignment of copyright.—The owner may assign his copyright—either wholly or partly (*y*), and either generally or for some locality, and either for its whole term or for any part thereof; and may grant any interest in his copyright by licence (*z*).

(*n*) S. 17.
(*o*) S. 18.
(*p*) S. 19.
(*q*) S. 21.
(*r*) S. 5 (1).
(*s*) S. 5 (1) (a). Although, therefore, the property in the negative may remain in the photographer, he may be restrained by the owner of the copyright from selling or exhibiting copies (*Boucas* v. *Cooke*, [1903] 2 K. B. 227; 72 L. J. K. B. 741; 88 L. T. 760; 19 T. L. R. 475—decided upon an earlier statute).
(*t*) S. 5 (1) (b).
(*u*) S. 21.
(*x*) S. 19 (1). Except in these two cases the word "author" is not defined by the Act.
(*y*) See s. 5 (3) for effect of partial assignment.
(*z*) S. 5 (2). An instrument which purports to assign copyright in publica-

But no such assignment or licence is valid unless it is in writing signed by the owner or his duly authorised agent (*z*). If the author of any work is the first owner of the copyright, no assignment or licence made by him (except by will) after the passing of the 1911 Act (*a*) can give any rights for longer than twenty-five years after the author's death, and the reversionary rights after that period pass on the author's death to his personal representative as part of his estate, and any agreement by him to dispose of such reversionary rights is void: this provision does not, however, apply to an assignment of the copyright in a collective work, or to a licence to publish a work as part of a collective work (*b*).

Infringement of copyright.—Copyright is infringed by doing, without the owner's consent, anything the sole right to do which is conferred by the 1911 Act on the owner thereof (*c*). It is also an infringement for any person—(i) to sell or let for hire or by way of trade to expose or offer for sale or hire, or (ii) to distribute for purposes of trade or to such an extent as prejudicially affects the owner of the copyright, or (iii) by way of trade to exhibit in public, or (iv) to import for sale or hire into any place to which the Act extends—any work which he knows to be an infringement of copyright (*d*); and also for any person for his private profit to permit a theatre or other place of entertainment to be used for public performance of a work without consent of the owner of the copyright, unless he did not know and had no reasonable ground to suspect the performance would be an infringement (*e*). But none of the

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tions not yet in existence is valid as an agreement to assign, and when the copyright is acquired by the assignor, the equitable ownership passes to the assignee, who cannot, however, maintain an action for infringement of the copyright without joining the legal owner (*Performing Right Society* v. *London Theatre of Varieties*, [1924] A. C. 1; 93 L. J. K. B. 33; 130 L. T. 450; 40 T. L. R. 52).

(*a*) Dec. 11, 1911.

(*b*) S. 5 (2). Collective work means (a) an encyclopædia, dictionary, year-book, or similar work; (b) a newspaper, review, magazine, or similar periodical; (c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated (s. 35).

(*c*) S. 2 (1).

(*d*) S. 2 (2).

(*e*) S. 2 (3). As to what constitutes permitting a theatre, etc., to be used, see *Performing Right Society* v. *Ciryl, etc., Syndicate*, [1924] 1 K. B. 1; 92 L. J. K. B. 811; 129 L. T. 653.

following acts is an infringement (*f*)—(i) Any fair dealing with any work for private study, research, criticism, review, or newspaper summary; (ii) Use by the author of an artistic work who is not owner of the copyright, of any mould, cast, plan, sketch or study made by him for the purpose of the work if he does not thereby repeat or imitate its main design; (iii) To make or publish paintings, drawings, engravings or photographs of a work of sculpture or artistic craftsmanship permanently situate in a public place or building or (unless architectural drawings or plans) of an architectural work of art; (iv) to publish for use of schools in a collection of mainly non-copyright matter, short passages from published literary works; (v) to publish in a newspaper a report of a public lecture, unless prohibited by conspicuous notice exhibited before and throughout the lecture at or about the main entrance of the building and (except during public worship) near the lecturer; or (vi) for one person to publicly read or recite any reasonable extract from any published work. And it is not an infringement of copyright in any musical work for any person to make records or other contrivances for the mechanical performance of the work, if he can prove (i) that such contrivances have previously been made with the consent or acquiescence of the owner of the copyright, and (ii) that he has given the prescribed notice of his intent to make the contrivances and has paid to him or for his benefit the prescribed royalties (*g*). A newspaper report of a political address at a public meeting is never an infringement of copyright (*h*).

Remedies for Infringement.—The civil remedies for infringement of copyright are an action for an injunction, and for damages or an account of net protfis made (*i*); but as against an infringer who did not know and had no reasonable ground for suspecting that copyright subsisted in the work, the only remedy is an injunction (*k*). In any action for infringement of copyright in any work it is to be presumed that the work is one in which that copyright exists, and that the plaintiff is the owner, unless the defendant puts both points or either in issue; and then, until the contrary is proved, the author is presumed to be the person whose name is

(*f*) S. 2 (1).
(*g*) S. 19 (2).
(*h*) S. 30.
(*i*) S. 6 (1).
(*k*) S. 8.

indicated thereon as author, and if no name or the true name of an author is not so indicated, then the owner of the copyright is presumed to be the person whose name is indicated on the work as publisher or proprietor (*l*). All infringing copies of any work in which copyright subsists are the property of the owner of the copyright, and he can bring an action of detinue in respect of unsold infringing copies, and an action for conversion in respect of such as have been sold (*m*). The owner of architectural copyright cannot, when an infringing structure has been commenced, obtain an injunction to prevent its completion or procure its demolition, and the structure does not become his property, and he cannot recover any summary penalties (*n*). Every action for infringement must be commenced within three years next after the infringement (*o*). The importation into the United Kingdom of copies of works made out of the United Kingdom which, if made in the United Kingdom, would infringe copyright, can be prevented on notice to the commissioners of customs (*p*).

International Copyright.—As regards international copyright, the 1911 Act provides (*q*) that an Order or Orders in Council may be made extending all or any parts of that Act to—(i) works first published in a foreign country as if they were published in British dominions coming under the Act; (ii) to literary, dramatic, musical, and artistic works, or any class thereof, when the authors were subjects or citizens of a foreign country as if such authors were British subjects; (iii) in respect of residence in a foreign country as if it were residence in British dominions coming under the Act (*r*).

Copyright in Designs.—Copyright in designs for the pattern, shape, configuration, or ornament of any article is now governed by the *Patents and Designs Acts*, 1907 and 1919 (*s*).

On application made in prescribed form by any person

(*l*) S. 6 (2).

(*m*) S. 7; *Birn Brothers* v. *Keene & Co., Ltd.*, [1918] 2 Ch. 281; 88 L. J. Ch. 24; 119 L. T. 364.

(*n*) S. 9.

(*o*) S. 10.

(*p*) S. 14.

(*q*) Ss. 29, 30.

(*r*) For the Orders in Council that have been made under the Act, see Williams' Personal Property, p. 418.

(*s*) 7 Edw. 7, c. 29, ss. 49—61; 9 & 10 Geo. 5, c. 80, ss. 14 and 15.

claiming to be the proprietor of any new or original design not previously published in the United Kingdom the Comptroller may register the design for one or more classes of articles (*t*), and copyright within these Acts means the exclusive right to apply a design to any article in any class in which the design is registered (*u*). When the design is registered the registered proprietor has copyright for five years from the date of registration, but, upon application in the prescribed time and manner the Comptroller must extend it for a second five years, and may do so for a third period of five years (*x*). While the copyright exists it is not lawful for any person (i) for the purposes of sale to apply or cause to be applied to any article in any class of goods in which the design is registered either the design or any fraudulent or obvious imitation thereof except with the licence or consent in writing of the registered proprietor, or to do anything with a view to enable the design to be so applied, or (ii) knowing that the design or any such imitation has been applied to any article without the consent of the registered proprietor, to publish, or expose, or cause to be published or exposed for sale that article; in case of any contravention of this section the registered proprietor (i) may sue for a penalty, recoverable as a simple contract debt, not exceeding £50 for each contravention or £100 in all in respect of any one design, or (ii) may bring an action for damages and an injunction (*y*).

Trade Marks.—Trade marks are now governed by the *Trade Marks Acts*, 1905, 1914, and 1919 (*z*), and the right to the exclusive use of a trade mark is obtained only by registration under these Acts. Before 1875 this right might be obtained by user and it was a well-established rule of the Common Law " that no man has a right to put off his goods for sale as the goods of a rival trader, and he cannot therefore . . . be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the

(*t*) Ss. 49, 50 (1907).
(*u*) S. 93 (1907).
(*x*) S. 53 (1907).
(*y*) S. 60 (1907).
(*z*) In the notes to this section these Acts will be referred to merely by their dates.

manufacture of another person" (*a*). The requirement of registration for trade marks was introduced by the Trade Marks Act, 1875, but neither that Act nor the Acts now in force have affected the main principles upon which the Courts have always acted in preventing one man from putting off his goods as those of another person.

Under the Acts a register of trade marks is kept at the Patent Office under the control of the Comptroller-General of Patents, Designs and Trade Marks, who in the Acts is referred to as the Registrar.

A *trade mark* is *defined* as "a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale" (*b*).

A *registrable trade mark* must contain or consist of at least one of the following essential particulars:—

1. The name of a company, individual, or firm represented in a special or particular manner;

2. The signature of the applicant for registration or some predecessor in his business;

3. An invented word or words;

4. A word or words having no direct reference to the character or quality of the goods and not being, according to its ordinary signification, a geographical name or a surname;

5. Any other distinctive mark; but a name, signature, or word which does not come under the four previous heads is not to be registrable except upon evidence of its distinctiveness (*c*).

Any "old mark," *i.e.*, any special or distinctive word or words, letter, numeral, or combination thereof continuously used by the applicant or his predecessors in business before August 13, 1875, and down to the date of application for registration was also made registrable by the Act of 1875 (*d*).

(*a*) *Leather Cloth Co.* v. *American Cloth Co.*, 11 H. L. C., at p. 538; 35 L. J Ch. 53; 12 L. T. 742.

(*b*) S. 3 (1905).

(*c*) S. 9 (1905), as amended by s. 7 (1919). The term "distinctive" means "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons" (*ibid.*).

(*d*) S. 9 (1905).

Nothing can be registered which would, because it is calculated to deceive or otherwise, be disentitled to protection in a Court of justice, or which would be contrary to law or morality, or would be a scandalous design (*e*). Nor, except by order of the Court, or in the case of trade marks in use before August 13, 1875, can any trade mark be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive (*f*). A trade mark must be registered in respect of particular goods or classes of goods (*g*); and can only be assigned with the goodwill of the business in those goods, and is terminable with such goodwill (*h*).

A valid registration gives the exclusive right to the use of the trade mark upon or in connection with the goods for which it is registered (*i*). In all legal proceedings, registration is *prima facie* evidence of the validity of the original registration and of subsequent assignments, and after seven years from the first registration the original registration shall be taken to be valid unless it was procured by fraud or the mark offends against s. 11 of the Act; but nothing in the Act entitles the registered proprietor to interfere with or restrain the user by any other person of a similar trade mark in connection with goods for which it had been continuously used by such person or his predecessors in business before the user of the registered trade mark by the proprietor or his predecessors in business (*k*); and no registration under the Act interferes with any *bona fide* use by a person of his own name or place of business, or that of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods (*l*).

Registration.—Application for registration must be made in writing and in the prescribed manner to the Registrar, who may refuse the application or may accept it absolutely, or subject to

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(*e*) S. 11 (1905).
(*f*) S. 19 (1905), see also s. 6 (2) (1919), *post*, p. 586.
(*g*) S. 8 (1905).
(*h*) Ss. 22, 23 (1905); Second Schedule (1919).
(*i*) S. 39 (1905).
(*k*) Ss. 40, 41 (1905).
(*l*) S. 44 (1905).

conditions, amendments or modifications, or limitations as to mode or place of user or otherwise; from the Registrar an appeal lies to the Court (*m*). If the application is accepted it is advertised, and any person may, within the prescribed time, give written *notice of opposition*, a copy of which is sent to the applicant, who must then send to the Registrar a statement of the grounds on which he relies for his application and, if he fails to do so, will be deemed to have abandoned his application. The Registrar then, after hearing the parties, if so required, and considering the evidence, decides whether registration will be permitted; from his decision an appeal lies to the Court (*n*).

The registration is for fourteen years but may be renewed from time to time in accordance with the provisions of the Act (*o*). A registered trade mark may be taken off the register in respect of any of the goods for which it was registered, on the ground that it was registered without any *bona fide* intention to use it in connection with the goods and that there has been no such *bona fide* user, or on the ground that there has been no such *bona fide* user during the preceding five years, unless in either case the non-user was due to special circumstances in the trade and not to any intention not to use or to abandon the trade mark (*p*). Provisions are also made by the Acts for the correction and rectification of the register (*q*), and for the registration of assignments (*r*).

By *Part I.* of the *Trade Marks Act*, 1919, the register was divided into two parts. Part A comprises all trade marks registered at the commencement of the Act, or registered after the Act under the provisions of the Act of 1905. Part B comprises all trade marks registered under Part I. of the Act of 1919, or entered therein or removed thereto under that Act (*s*).

Where any mark has for not less than two years been *bona fide* used in the United Kingdom upon or in connection with any goods for the purpose of indicating that they are the goods of the proprietor of the mark by virtue of manufacture, selection,

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(*m*) S. 12 (1905); s. 8 and Second Schedule (1919).
(*n*) Ss. 13, 14 (1905); s. 8 and Second Schedule (1919).
(*o*) Ss. 28—31 (1905).
(*p*) S. 37 (1905).
(*q*) S. 32 (1905); s. 9 (1919).
(*r*) S. 11 (1919), repealing s. 33 (1905).
(*s*) S. 1 (1919).

dealing with or offering for sale, the person claiming to be the proprietor of the mark may apply in writing in the prescribed manner to the Registrar to have the mark entered as his registered trade mark in Part B in respect of such goods. If the Registrar considers that the application is inconsistent with s. 11 or s. 19 of the Act of 1905, or is not satisfied that the mark has been so used as aforesaid or that it is capable of distinguishing the goods of the applicant, he may refuse it or may accept it subject to any conditions, amendments, modifications or limitations; from his refusal or conditional acceptance an appeal lies to the Court; if the application is accepted it must be advertised in accordance with the provisions of the Act of 1905 (*t*).

The registration of a person as proprietor of a trade mark in Part B is *prima facie* evidence of his exclusive right to its user, but in any action for infringement of a trade mark entered in Part B no injunction or other relief will be granted in respect of such registration, if the defendant establishes to the satisfaction of the Court that the user of which the plaintiff complains is not calculated to deceive or to lead to the belief that the goods the subject of such user were goods manufactured, selected, certified, dealt with or offered for sale by the proprietor of the trade mark (*u*).

Part II. of the Act of 1919 provides that, where, in the case of an article or substance manufactured under any *patent*, a word trade mark registered under the Act of 1905 or Part I. of the Act of 1919 is the name, or only practicable name, of the article or substance so manufactured, all rights to the exclusive use of such trade mark, whether under the Common Law or by registration, shall cease upon the expiration of the patent, and thereupon, such word may be removed from the register on the application of any person aggrieved (*x*). It also provides that no word which is the only practicable name or description of any single chemical element or single chemical compound, as distinguished from a mixture, shall be registered as a trade mark, and that any such word on the register may be removed; this sub-section does not, however apply where the mark is used to denote only the proprietor's brand or make of such substance, as distinguished

(*t*) S. 1 (1919). (*u*) S. 4 (1919). (*x*) S. 6 (1) (1919).

from the substance made by others, and in association with a suitable and practical name open to public use (*y*).

Infringement.—An action for infringement lies whenever the defendant has used upon goods for which the plaintiff's mark is registered (*z*) either the plaintiff's trade mark or one "so nearly resembling that of the plaintiff as to be calculated to mislead incautious purchasers" (*a*). Any infringement of a trade mark entitles the proprietor to obtain an injunction to restrain its continuance and, for this purpose, it is unnecessary to prove that the infringement was fraudulent, or that any one was in fact deceived (*b*); but damages, or the alternative equitable remedy of an account of profits, cannot be obtained from an innocent infringer (*c*).

In any legal proceeding in which the validity of the registration of a registered trade mark comes into question and is decided in favour of the proprietor of such trade mark, the Court may certify the same, and if it so certifies, then in any subsequent legal proceeding in which such validity comes into question, the proprietor, on obtaining a final judgment or order in his favour, will have costs as between solicitor and client, unless the Court otherwise certifies (*d*).

No proceedings can be taken to prevent or to recover damages for the infringement of an *unregistered* trade mark unless it was in use before August 13, 1875, and has been refused registration under the Act of 1905 (*e*).

Passing Off Actions.—Independently of the Trade Marks Act the Common Law rule remains "that a man has no right to put off his goods for sale as the goods of a rival trader." And by s. 45 of the *Trade Marks Act*, 1905, it is expressly provided that "nothing in the Act shall be deemed to affect rights of action

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(*y*) S. 6 (2) (1919).

(*z*) *Hart* v. *Colley*, 44 Ch. D. 193; 59 L. J. Ch. 335; 62 L. T. 623.

(*a*) *Johnston* v. *Orr-Ewing*, 7 A. C., at p. 229; 51 L. J. Ch. 797; 46 L. T. 216.

(*b*) *Bourne* v. *Swan & Edgar, Ltd.*, [1903] 1 Ch. 211; 72 L. J. Ch. 168; 87 L. T. 589; 19 T. L. R. 59.

(*c*) *Slazenger & Sons* v. *Spalding*, [1910] 1 Ch. 257; 79 L. J. Ch. 122; 102 L. T. 390. The register of trade marks is not notice to all the world of registration of the existence of a registered mark (*id.*).

(*d*) S. 46 (1905).

(*e*) S. 42 (1905).

against any person for passing off goods as those of another person or the remedies in respect thereof."

Accordingly, where goods are sold under a name by which they have become known as the goods of a particular trader, whether such name be the name of the trader himself (*f*), or a fancy word (*g*), or a descriptive term, no other person has the right to use that name *so as to represent that he is selling the goods of that trader*. This general rule is, however, subject to two qualifications. In the first place a purely descriptive name, such as " cellular " does not come within the rule unless it has acquired a secondary or special meaning so as to denote only the goods of one particular trader (*h*). Secondly, a name which originally denoted the goods of a particular trader may have lost its primary meaning, and may have come to denote goods merely of a particular kind, character and quality, in which case it may be used by any one who makes goods of that kind, character or quality (*i*).

And a man may not use his own name in such a way as to

(*f*) See *Singer Manufacturing Co.* v. *Loog*, 8 A. C., at pp. 33, 38; 52 L. J. Ch. 481; 38 L. T. 303; *W. H. Dorman & Co.* v. *Henry Meadows, Ltd.*, [1922] 2 Ch. 332; 91 L. J. Ch. 728; 127 L. T. 655.

(*g*) See, *e.g.*, *The Birmingham Vinegar Brewery Co., Ltd.* v. *Powell*, [1897] A. C. 710; 66 L. J. Ch. 763; 76 L. T. 792 (Yorkshire Relish); see also *Cellular Clothing Co.* v. *Maxton and Murray*, [1899] A. C., at p. 339; 68 L. J. P. C. 72; 80 L. T. 809.

(*h*) *Cellular Clothing Co.* v. *Maxton and Murray* (*ubi supra*), distinguishing *Reddaway* v. *Banham*, [1896] A. C. 199; 65 L. J. Q. B. 381; 74 L. T. 289. In the latter case the plaintiff had for some years sold belting described as " Camel Hair Belting," and that name had come to mean in the trade the plaintiff's belting only. The defendant began to sell belting made of camel hair, which he stamped " Camel Hair Belting." *Held*, that the plaintiff was entitled to an injunction to restrain the defendant from using the words " Camel Hair " as descriptive of his belting without clearly distinguishing such belting from that made by the plaintiff.

(*i*) The test as to whether a name has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public, and to induce the public to buy goods not made by the person originally using the name as if they were his goods, see *Ford* v. *Foster*, L. R. 7 Ch. 611; 41 L. J. Ch. 682; 27 L. T. 219; *Singer Manufacturing Co.* v. *Loog*, 8 A. C. 15; 52 L. J. Ch. 481; 48 L. T. 3 (here a question arose whether the name " Singer " sewing machine was a designation of machines made by the plaintiff or had become the designation merely of machines of a particular type); *Havana, etc., Factories* v. *Oddenino*, [1924] 1 Ch. 179; 93 L. J. Ch. 81; 130 L. T. 428; 40 T. L. R. 102 (here the question was whether the term " Corona," which had been used for many years by the plaintiffs and their predecessors, still applied only to cigars of the plaintiffs' brand or had come to mean a cigar of a particular size and shape).

represent that the goods which he is selling are the goods of another person, or that the business which he is carrying on is the business of another (*k*). But " the Court cannot stop a man from carrying on his busines in his own name, although it may be the name of a better-known manufacturer, when he does nothing at all in any way to try and represent that he is that better-known and successful manufacturer " (*l*).

Lastly, apart from the user of any trade name, one person may not imitate the appearance or get-up of another person's goods in a manner calculated to deceive and to lead to his goods being passed off on those who wish to buy the goods of that other person (*m*).

In all passing-off actions the issue is a simple question of fact, namely, whether the defendant has sold his goods so as to represent them as being the goods of the plaintiff (*n*). If this is the case the plaintiff can obtain an injunction without proving any intent to deceive on the part of the defendant (*o*), or that any one was in fact deceived (*p*). And if the defendant has acted with the intention of deceiving purchasers and of inducing them to believe that his goods are the goods of another the plaintiff can recover damages and is entitled to nominal damages even though no special damage is proved (*q*). A trade name is property the right to use which passes with the goodwill of a business (*r*).

(*k*) See, for example, *Tussaud* v. *Tussaud*, 44 Ch. D. 678; 59 L. J. Ch. 631; 62 L. T. 678 (reviewing the earlier authorities). Where the defendant had *assumed* a name for the purpose of passing off his boots and shoes as those of the plaintiff, he was restrained absolutely from using the name in connection with the sale or manufacture of boots or shoes (*Pinet & Co., Ltd.* v. *Maison Louis Pinet*, [1898] 1 Ch. 179; 67 L. J. Ch. 41; 77 L. T. 613; 14 T. L. R. 87).

(*l*) *Turton* v. *Turton*, 42 Ch. D., at p. 143.

(*m*) See *Edge & Sons, Ltd.* v. *William Niccolls & Sons, Ltd.*, [1911] A. C. 693; 80 L. J. Ch. 744; 105 L. T. 459; 27 T. L. R. 555.

(*n*) See *Turton* v. *Turton* (*ubi supra*); *Birmingham, etc., Brewery Co.* v. *Powell* (*ubi supra*); *Cellular Clothing Co.* v. *Maxton and Murray* (*ubi supra*).

(*o*) *Turton* v. *Turton* (*ubi supra*); *Cellular Clothing Co.* v. *Maxton and Murray* (*ubi supra*).

(*p*) *Johnston* v. *Orr-Ewing*, 7 A. C. 219; 51 L. J. Ch. 797; 46 L. T. 216; *Singer Manufacturing Co.* v. *Loog* (*ubi supra*).

(*q*) *Singer Manufacturing Co* v. *Loog* (*ubi supra*); *Reddaway* v. *Bentham, etc., Co.*, [1892] 2 Q. B. 639; 67 L. T. 301.

(*r*) *Singer Manufacturing Co.* v. *Loog* (*ubi supra*).

CHAPTER III.

NEGLIGENCE AND DUTIES OF INSURANCE.

In English law there is no such thing, technically speaking, as an action of negligence: there are, however, many actions of case in which some want of care on the part of the defendant is a condition of his liability; there are also some circumstances in which a defendant is an insurer of the safety of the persons or property of others, so that his liability is independent of any want of care on his part.

Cases in which the liability of the defendant depends upon want of care on his part fall into two classes—(i) cases in which he is liable only for negligence; (ii) cases in which he is under some specific duty of avoiding harm to others. We shall accordingly deal first with the ordinary liability for negligence and then with the special cases in which some specific duty is defined by law, or in which the defendant is an insurer.

Negligence.

Where a plaintiff claims damages for injuries caused by the negligence of the defendant, he must prove (i) that the defendant was under a duty not to be negligent towards him personally or towards a class of persons of which he is a member; (ii) that the defendant was negligent; (iii) that the injury or damage of which he complains was caused by the defendant's negligence.

The Defendant must be under a Duty towards the Plaintiff.—It is not enough to show that the defendant has been guilty of negligence without showing . . . how he became bound to use care to prevent injury (*a*). "A man is entitled to be as

(*a*) *Gautret* v. *Egerton*, L. R. 2 C. P., at p. 374; 36 L. J. C. P. 191; 16 L. T. 17.

negligent as he pleases towards the whole world if he owes no duty to them" (*b*). Thus, in the case of *Le Lievre* v. *Gould*, A from time to time advanced money to B, who was a builder, upon the faith of certificates given by the defendant, a surveyor *employed by B*, as to the progress of the buildings upon the security of which the money was lent. Through the negligence of the surveyor, the certificates contained inaccurate statements as to the progress of the works. It was held that there was no relationship between A and the defendant which could make the latter liable to A for the results of his negligence.

No general rule has yet been laid down by English law for determining when a duty to avoid negligence exists. There are, however, three principal classes of cases, namely:—

1. Cases in which there is an area or a subject-matter in which, or in respect of which, both the plaintiff and the defendant are exercising rights and neither right is, as such, subordinated to the other (*c*), so that a duty lies upon the defendant not to exercise his rights so as to injure the equal rights of the plaintiff.—Thus, where both parties are upon a highway, where each of them has a right to be, it is the duty of each to use reasonable care to avoid injury to the person and property of the other (*d*). So also, one owner of a party wall must, in building operations, use "every reasonable precaution that care and skill might suggest in the execution of his works," so as to protect from injury the co-owner of the wall (*e*).

2. Bailees and persons employed to perform services for others.—Such persons are under a duty to use not only reasonable care, but reasonable skill. An unpaid bailee and a person

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(*b*) *Le Lievre* v. *Gould*, [1893] 1 Q. B., at p. 497; 62 L. J. Q. B. 353; 68 L. T. 626. See also *Mersey Docks, etc., Board* v. *Procter*, [1923] A. C. 253; 92 L. J. K. B. 479; 129 L. T. 34; 39 T. L. R. 275.

(*c*) See *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C., at p. 64; 91 L. J. P. C. 49; 126 L. T. 262; 38 T. L. R. 102.

(*d*) *Tillett* v. *Ward*, 10 Q. B. D., at p. 20; 52 L. J. Q. B. 61; 47 L. T. 546; *Le Lievre* v. *Gould* (*ubi supra*). And, unless the plaintiff can prove negligence he cannot succeed (*ante*, p. 496). In cases of this description the question of liability for negligence arises only when the rights of the parties are equal or qualified. If the defendant has an absolute right to do an act, the fact that it causes damage does not make him liable (*ante*, p. 494), and if he infringes an absolute right of the plaintiff, the presence of negligence is immaterial.

(*e*) *Hughes* v. *Percival*, 8 A. C. 443; 52 L. J. Q. B. 719; 49 L. T. 189.

who performs services gratuitously is liable only for failure to use reasonable care and such skill as he is possessed of (*f*). But a person who holds himself out for employment for reward in any capacity is liable unless he *possesses* and exercises reasonable skill. "From the former is reasonably expected such care and diligence as persons ordinarily exercise in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence such as are exercised in the ordinary and proper course of similar business and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment" (*g*).

3. Persons performing public or statutory duties. Thus public officers are liable for their own negligence in the performance of their duties, and, except in the case of servants of the Crown (*h*), for the negligence of their subordinates. If, for example, by the negligence of a sheriff or his officers execution is not levied upon the goods of a judgment debtor when it might and ought to have been done, so that damage is caused to the execution creditor (*i*); or if, after levy, the goods are negligently sold at an undervalue (*k*), the sheriff is liable to an action at the suit of the execution creditor (*l*). So also a medical man who

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(*f*) *Shiells & Thorne* v. *Blackburne*, 1 H. Bl. 158; 2 R. R. 750. See *Wilson* v. *Brett*, 11 M. & W. 113; 12 L. J. Ex. 264; 63 R. R. 528; where it was held that the defendant who gratuitously rode a horse for the plaintiff was bound, being skilled in horses, "to use such skill in the management of the horse as he possessed."

(*g*) *Beal* v. *South Devon Railway*, 3 H. & C., at p. 342; 140 R. R. 478; 11 L. T. 184. "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill" (*Lamphier* v. *Phipos*, 8 C. & P., at p. 479). As to solicitors, see *ante*, p. 250.

(*h*) *Ante*, p. 499.

(*i*) *Hobson* v. *Thelluson*, L. R. 2 Q. B. 642; 36 L. J. Q. B. 302; 16 L. T. 837. Some pecuniary damage must be shown: *prima facie* the measure of damage is the value of the goods which might have been and were not seized; but it is for the jury to say whether or not, in the circumstances of any particular case, the plaintiff would have derived any benefit from the execution.

(*k*) *Mullet* v. *Challis*, 16 Q. B. 239; 20 L. J. Q. B. 161; *Wright* v. *Child*, L. R. 1 Ex. 358; 35 L. J. Ex. 209; 15 L. T. 141.

(*l*) It is the sheriff's business to find out what goods to seize, and, if he seizes the goods of the wrong person, such person will have a remedy against the sheriff. It is no part of the ordinary duty of a solicitor to direct the sheriff to seize particular goods, but, if he does so, and the goods of a person other than the judgment debtor are seized, he, as well as the sheriff, is liable for the trespass. But as he has no implied authority from his client to give such directions, the client is not liable unless the solicitor has express authority or his act has been ratified by his client. An indorsement by the solicitor on

undertakes the statutory duty of giving a certificate that a person is of unsound mind must use reasonable care and, if he fails to do so, he is liable for any damage thereby caused to the person in respect of whom the certificate is given (*m*).

The Defendant must have been Negligent.—" Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use " (*n*). It does not refer to the defendant's state of mind but to his conduct, so that a man may be negligent although he acts to the best of *his own* judgment (*o*). It consists in conduct lacking in reasonable care, in doing or omitting to do (*p*); something which, in all the circumstances of the case would not have been done or omitted by a prudent and reasonable man (*q*).

The degree of care which ought to have been taken, and the question whether it was taken, are both matters for the jury to decide (*r*).

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writ of *fieri facias* of the address of the judgment debtor *may* amount to a direction to the sheriff to seize the goods at that address (*Smith* v. *Keal*, 9 Q. B. D. 340; 51 L. J. Q. B. 287; 47 L. T. 142; *Morris* v. *Salberg*, 22 Q. B. D. 614; 58 L. J. Q. B. 275).

(*m*) *Harnett* v. *Fisher*, [1927] 1 K. B. 802; 96 L. J. K. B. 55.

(*n*) *Grill* v. *General Iron Screw Collier Co.*, L. R. 1 C. P., at p. 612; 35 L. J. C. P. 321; 14 L. T. 711.

(*o*) *Vaughan* v. *Menlove*, 3 Bing. (N.C.) 468; 43 R. R. 711; 6 L. J. C. P. 92. In *civil* proceedings no question therefore arises as to the existence of *mens rea*.

(*p*) With regard, however, to a person who undertakes a voluntary act, though he is liable if he performs it improperly, he is not liable if he neglects altogether to perform it (*Skelton* v. *London and North Western Railway*, L. R. 2 C. P., at p. 636; 35 L. J. C. P. 249; 16 L. T. 563).

(*q*) *Blyth* v. *Birmingham Waterworks Co.*, 11 Ex. 781; 25 L. J. Ex. 212; 105 R. R. 791; *Ruck* v. *Williams*, 3 H. & N. 208; 27 L. J. Ex. 357; 117 R. R. 697; *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679; 29 L. J. Ex. 247; 2 L. T. 394; 120 R. R. 779.

(*r*) *Morrison* v. *Sheffield Corporation*, [1917] 2 K. B., at p. 870; 86 L. J. K. B. 1456; 117 L. T. 520; 33 T. L. R. 492. See also *Pearson* v. *Cox*, 2 C. P. D. 369; 36 L. T. 495. The expression " gross negligence " has never been a word of definition, indicating a *degree* of negligence greater than the lack of ordinary care and skill. It has, however, been loosely used as *descriptive* of the *kind* of negligence for which persons rendering gratuitous services were liable as distinct from persons who were paid for their services, that is to say, the lack of ordinary care and skill, as distinct from the care of a skilled workman (*Grill* v. *Iron Screw Collier Co.*, L. R. 1 C. P., at p. 612). But there is no rule of law that a person who renders gratuitous services is liable only for gross negligence in the sense of some negligence which is more " gross " than the failure to use ordinary care and skill : to

Evidence of negligence.—Before any question of negligence can be left to the jury, there is a preliminary question, which is one of *law* for the judge—namely, "whether any facts have been established by evidence from which negligence *may be* reasonably inferred" (*s*). If there is no evidence of negligence it is the duty of the Judge to withdraw the case from the jury (*t*).

The mere occurrence of an accident is not in itself evidence of negligence, except when the principle of *res ipsa loquitur* is applicable—that is to say, "when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened" (*u*). Thus the mere fact that a motor vehicle skids (*x*), or that a horse runs away (*y*), is no evidence of negligence on the part of the person driving it, because either of such facts may happen from many causes without negligence on his part. But "where the [cause of the accident] is under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the

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render him liable it is sufficient that the jury have found against him a want of ordinary and reasonable care or skill (*Karavias* v. *Callinocos*, [1917] W. N. 323). This point was decided as early as 1843, in the case of *Wilson* v. *Brett* (*ubi supra*), where Rolfe, B., in considering what was negligence in the case of a person rendering gratuitous services, said that he "could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet." The similar expression *crassa negligentia* also means nothing more than want of ordinary prudence (*Overend, Gurney & Co.* v. *Gibb*, L. R. 5 H. L., at p. 487; 42 L. J. Ch. 67).

(*s*) *Metropolitan Railway Co.* v. *Jackson*, 3 A. C., at p. 197; 47 L. J. C. P. 303; 37 L. T. 679.

(*t*) *Dublin, etc., Railway Co.* v. *Slattery*, 3 A. C., at p. 1175; 39 L. T. 365. The same rule applies if there is no evidence connecting the negligence with the damage suffered by the plaintiff (*ibid.*). But if the plaintiff has adduced such evidence as, if uncontradicted, would justify a verdict in his favour, no amount of contradictory evidence will justify the withdrawal of the case from the jury (*id.*, at p. 1168).

(*u*) *Wing* v. *London General Omnibus Co.*, [1909] A. C., at pp. 663, 664; 78 L. J. K. B. 1063; 101 L. T. 411; 25 T. L. R. 729.

(*x*) *Id.*

(*y*) *Hammack* v. *White*, 11 C. B. (N.S.) 588; 31 L. J. C. P. 129; 132 R. R. 687; *Manzonie* v. *Douglas*, 6 Q. B. D. 145; 50 L. J. Q. B. 289; and for another instance, see *Crisp* v. *Thomas*, 63 L. T. 756.

defendants, that the accident arose from want of care" (*z*). Accordingly, the fall of a sack from a crane (*a*) and the fall of a barrel from a window of a shop into the highway (*b*) have been held to constitute evidence of negligence. Again, negligence cannot be inferred from the failure to take extraordinary precautions—as, *e.g.*, to guard against a frost of extraordinary severity (*c*). So, also, negligence cannot be inferred from the mere fact that a person leaves standing in the road a motor car, which will not move unless some person intentionally puts it in motion (*d*). But it is otherwise if a horse, which may move of its own accord, is left unattended in a street (*e*).

The Negligence must be the Cause of the Damage Sustained by the Plaintiff.—A leading case upon this point is that of *Wakelin* v. *London and South Western Railway* (*f*). The dead body of a man was found at night on the defendants' line near a level-crossing, he having been killed, as the defendants admitted, by a train which did not whistle or give any warning of its approach other than that afforded by the headlights. There was no evidence as to how the deceased got on the line. It was held by the House of Lords that, even assuming there was evidence of negligence by the defendants, there was no evidence connecting the negligence with the accident; there was nothing "to show that the train ran over the man rather than that the man ran against the train." Another leading case on the same point is that of *Metropolitan Railway Co.* v. *Jackson*. Here the

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(*z*) *Scott* v. *London Dock Co.*, 3 H. & C. 596; 34 L. J. Ex. 220; 140 R. R. 627; 13 L. T. 148. See also *Cole* v. *De Trafford*, [1918] 2 K. B., at p. 528; 86 L. J. K. B. 764; 117 L. T. 224; 33 T. L. R. 249.

(*a*) *Scott* v. *London Dock Co.* (*ubi supra*).

(*b*) *Byrne* v. *Boadle*, 2 H. & C. 722; 33 L. J. Ex. 13; 133 R. R. 761; 9 L. T. 450.

(*c*) *Blyth* v. *Birmingham Waterworks* (*ubi supra*).

(*d*) *Ruoff* v. *Long & Co.*, [1916] 1 K. B. 148; 85 L. J. K. B. 364; 114 L. T. 186; 32 T. L. R. 82. But there is evidence of negligence where a motor car whose brakes are out of order is left unattended on a hill, with merely a block of wood as a brake, so that it can easily be moved (*Martin* v. *Stanborough*, 41 T. L. R. 1; see also *Parker* v. *Miller*, 42 T. L. R. 408).

(*e*) *Lynch* v. *Nurdin*, 1 Q. B. 29; 10 L. J. Q. B. 73; 55 R. R. 191; *Gayler & Pope, Ltd.* v. *Davies & Son, Ltd.*, [1924] 2 K. B. 75; 93 L. J. K. B. 702; 131 L. T. 507; 40 T. L. R. 591; see also *post*, p. 609.

(*f*) 12 A. C. 41; 56 L. J. Q. B. 229; 55 L. T. 709.

plaintiff was a passenger upon the defendants' railway. At Gower Street Station three persons forced themselves into his carriage, which was full, so that they had to stand. At the next station some more persons tried to get into the carriage. The plaintiff rose to prevent them, and while he was standing up the train began to move. To steady himself he put his hand upon the edge of the door of the carriage. A porter came up at that moment, pushed away the persons who were trying to enter, and shut the door upon the plaintiff's hand. It was held that, assuming that the overcrowding of the train was evidence of negligence on the part of the defendants, there was no evidence connecting this negligence with the injury to the plaintiff (*g*).

As was pointed out in the last case, evidence of "general carelessness" is neither sufficient nor relevant; negligence on a *particular occasion* cannot be inferred from the fact that a railway company is "unpunctual and irregular in its service, badly equipped as to its staff, . . . notorious, perhaps, for accidents occurring on its line" (*h*).

If, however, it is found that the defendant was guilty of negligence, he is liable for all the actual results of his negligence, although they were not of a particular kind which he might have anticipated (*i*). And it is not necessary that the injury should be the immediate result of his negligence; it is sufficient if it is connected therewith by a continuous causal sequence: but he is not liable for independent acts of third persons, breaking the chain of causation, unless he is under a special duty to guard against such acts (*j*).

Contributory negligence.—A defendant may set up that an accident was "wholly and entirely caused by the negligence of the plaintiff himself." He may also set up the entirely distinct defence of "contributory negligence"—*i.e.*, that although he was negligent, and although the accident was in some degree due to his negligence, yet its real or proximate cause was the neg-

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(*g*) 3 A. C. 193; 47 L. J. C. P. 303; 37 L. T. 679. See also *Hambrook* v. *Stokes* (*ante*, p. 509); *Harnett* v. *Bond* (*ante*, p. 512): *Mersey Docks, etc., Board* v. *Procter*, [1923] A. C. 253; 92 L. J. K. B. 479; 129 L. T. 34; 39 T. L. R. 275.

(*h*) *Id.*; 3 A. C., at p. 197.

(*i*) *Ante*, pp. 510, 511.

(*j*) *Ante*, p. 513 (note (*d*)); and *post*, p. 609.

ligence of the plaintiff himself (*k*). Upon this question three rules have been laid down (*l*)—

(i) " The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care (*m*) which has contributed to cause the accident."

(ii) " Though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him ";

(iii) This last rule applies where the want of ordinary care and diligence on the part of the defendant, though anterior in point of time to the plaintiff's negligence, incapacitated him from exercising such care as would have avoided the result of the plaintiff's negligence. Thus, in a collision between two vehicles, if (i) the defendant was negligent, and (ii) the plaintiff was guilty of negligence contributing to the collision, and (iii) the collision is caused through a defect in the brakes of the defendant, due to his negligence, the defendant is liable although he did his best to avoid the consequences of the plaintiff's negligence.

Where, however, the defendant has by his negligence placed

(*k*) See *Dublin, etc., Railway Co.* v. *Slattery*, 3 A. C., at pp. 1177, 1178; 39 L. T. 365; *Thomas* v. *Quartermaine*, 18 Q. B. D., at p. 694; 56 L. J. Q. B. 340; 57 L. T. 537. See also *Jackson* v. *Anglo-American Oil Co.*, [1923] 2 K. B., at p. 607; 92 L. J. K. B. 1000; 129 L. T. 792, where the various methods of pleading contributory negligence are set out and explained. The defence of contributory negligence must be distinguished from that of *Volenti non fit injuria*, which asserts that the plaintiff, by voluntarily taking the risk of harm, released the defendant from a duty which would otherwise have existed. " Contributory negligence arises when there has been a breach of duty on the defendant's part, not where *ex hypothesi* there has been none " (18 Q. B. D., at p. 697).

(*l*) The first two rules were laid down in *Radley* v. *London and North Western Railway*, 1 A. C. 754; 46 L. J. Ex. 573; 35 L. T. 637; the third rule and illustration occur in *British Columbia Electric Co.* v. *Loach*, [1916] 1 A. C. 719; 85 L. J. P. C. 23; 113 L. T. 946.

(*m*) The question of contributory negligence does not depend upon any breach of duty as between the plaintiff and a negligent defendant, but upon the question whether the plaintiff could reasonably have avoided the consequences of the defendant's negligence (*H. & C. Grayson* v. *Ellerman Lines*, [1920] A. C., at p. 477; 89 L. J. K. B. 924; 123 L. T. 65; 36 T. L. R. 925).

the plaintiff in a dangerous situation, he cannot set up the defence of contributory negligence merely because the plaintiff, acting under a reasonable apprehension of danger, and in a reasonable and prudent way, has adopted a perilous way of escape from the dangerous situation created by the defendant (*n*). And, conversely, if the plaintiff by his negligence makes an accident so threatening that, although by appropriate measures the defendant could avoid it, the defendant has not really time to think, and by mistake takes the wrong measure, the defendant will not be held guilty of negligence and the plaintiff will fail (*o*).

The contributory negligence must be that of the plaintiff himself or of someone standing in such a relation to the plaintiff that his acts or defaults must be regarded as those of the plaintiff—*e.g.*, the relation of master and servant, or employer and agent acting within the scope of his authority (*p*), or parent

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(*n*) *Jones* v. *Boyce*, 1 Stark. 493; 18 R. R. 812. Here, through the negligence of the driver of a coach, an upset seemed imminent. The plaintiff, who was an outside passenger, accordingly jumped off, breaking his leg. *Held*, that the defendant was liable, since by his default he had placed the plaintiff "in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril." See also *Brandon* v. *Osborne, Garrett & Co.*, [1924] 1 K. B. 548; 93 L. J. K. B. 304; 130 L. T. 670; 40 T. L. R. 325. Here, while the plaintiff and her husband were in a shop, a window in the roof was broken by the negligence of workmen, and part of the glass fell and struck the husband. His wife, seeing the glass falling and reasonably believing her husband to be in danger, instinctively clutched his arm to pull him out of danger, thereby straining her leg and causing herself serious injury. *Held*, that she did what, in the circumstances, was a reasonable and proper thing to do and was not therefore guilty of contributory negligence, and, further, that it was immaterial that she had acted to save her husband and not herself. But this principle does not apply where a plaintiff runs a risk, not in order to avoid alternative risks, but merely to escape slight inconvenience—as, *e.g.*, where he falls out of a railway carriage in trying to shut a door with a defective lock (*Adams* v. *Lancashire and Yorkshire Railway*, L. R. 4 C. P. 739; 38 L. J. C. P. 277; 20 L. T. 850). It may, however, apply where the inconvenience is great, and the risk is not "so great that no sensible man would have incurred it." Thus, in *Clayards* v. *Dethick* (12 Q. B. 439; 76 R. R. 305), the defendants, being commissioners for sewers, made a trench in the only outlet from some mews, leaving only a narrow passage, on which they heaped earth and gravel. The plaintiff, a cab proprietor, in order to get his horse out of the mews, led it over the heaped-up gravel, which gave way and allowed the horse to slip into the trench, causing its death. *Held*, that he was entitled to recover, as the danger was not so obvious that he could not with common prudence make the attempt.

(*o*) *The Bywell Castle*, 4 P. D. 219; 41 L. T. 747; *Admiralty Commissioners* v. *S.S. Volute*, [1922] 1 A. C., at p. 136; 91 L. J. P. C. 38; 126 L. T. 425; 38 T. L. R. 225.

(*p*) *The Bernina*; *Mills* v. *Armstrong*, 13 A. C., at p. 8; 57 L. J. P. 67; 58 L. T. 423.

and infant child (*q*). It was formerly thought that this principle of identification applied as between a passenger on a public vehicle and the driver: since 1888, however, it has been settled that "an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and in the other of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions and thereby causes mischief" (*r*).

Whether or not the plaintiff has been guilty of contributory negligence is a question of fact, provided that there is sufficient evidence of its existence to go to the jury: the burden lies upon the defendant to prove affirmatively the existence of the contributory negligence of the plaintiff, and not upon the plaintiff to prove negatively that he did not contribute to the accident by any negligence of his own (*s*).

The contributory negligence of a child may disentitle it to recover in the same way as an adult, except where the accident is due to something constituting an allurement to children or to a dangerous chattel or animal left unguarded by the defendant in a public or accessible place (*t*).

Special Duties and Liabilities.

We now have to consider various cases in which some special duty or liability is defined or imposed by law in addition to the liability for ordinary negligence (*u*).

Duties Attached to the Ownership and Occupation of Property.—These duties are of the following classes:—

(*q*) *Waite* v. *North Eastern Railway*, E. B. & E. 719; 113 R. R. 855; 28 L. J. Q. B. 258.

(*r*) *The Bernina*, 13 A. C., at p. 18, overruling *Thorogood* v. *Bryan*, 8 C. B. 115; 18 L. J. C. P. 336, and distinguishing *Waite* v. *North Eastern Railway* (*ubi supra*).

(*s*) *Dublin, etc., Railway* v. *Slattery*, 3 A. C., at pp. 1179-1181; 39 L. T. 365.

(*t*) *Latham* v. *Johnson*, [1913] 1 K. B. 398; 82 L. J. K. B. 258; 108 L. T. 4; 29 T. L. R. 124 (reviewing all the earlier authorities); *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C. 44; 91 L. J. P. C. 49; 126 L. T. 262; 38 T. L. R. 102.

(*u*) See, for example, *Tebbutt* v. *Bristol and Exeter Railway*, L. R. 6 Q. B. 73; 40 L. J. Q. B. 78; 23 L. T. 772.

1. *Duties towards adjoining owners and occupiers.*—The legal principle in this class of cases was well known in English law from an early period, but was explained and formulated in the case of *Rylands* v. *Fletcher* (*x*). This principle is that a person "who for his own purposes brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, . . . does so *at his peril.* If it does escape and cause damage, he is responsible, *however careful he may have been, and whatever precautions he may have taken to prevent the damage*" (*y*). This principle has been applied in many cases—*e.g.*, to the escape of water stored in a reservoir (*z*), to the escape of fire (*a*), electricity (*b*), sewage (*c*), and fumes from creosoted wood-paving (*d*); to yew-trees planted by the defendant and which projected over adjoining property and poisoned cattle that ate the leaves (*e*), to decayed strands of a wire fence which fell into adjoining pasture and were swallowed by cattle grazing there (*f*), to colliery refuse (*g*), to damage caused to neighbouring property by an explosion on the defendants' land of explosives there stored by them (*h*), and to vibrations set up by building

(*x*) L. R. 3 H. L. 330; 37 L. J. Ex. 161; 19 L. T. 220. Logically, the rule in *Rylands* v. *Fletcher* seems no more than a rule applicable to certain classes of nuisances. It has, however, developed into a distinct rule, subject to special conditions and exceptions, and it is convenient to deal with it separately and in this chapter.

(*y*) L. R. 3 H. L., at p. 340.

(*z*) *Rylands* v. *Fletcher* (*ubi supra*). See also *Snow* v. *Whitehead*, 27 Ch. D. 588; 53 L. J. Ch. 885; 51 L. T. 253 (escape of water which had accumulated in a cellar dug by the defendant).

(*a*) *Jones* v. *Festiniog Railway Co.*, L. R. 3 Q. B. 733; 37 L. J. Q. B. 214; 18 L. T. 902. See also *post*, p. 611.

(*b*) *National Telephone Co.* v. *Baker*, [1893] 2 Ch. 186; 62 L. J. Ch. 699; 68 L. T. 283; *Eastern, etc., Co.* v. *Cape Town, etc., Co.*, [1902] A. C. 381; 71 L. J. P. C. 122; 86 L. T. 457.

(*c*) *Humphries* v. *Cousins*, 2 C. P. D. 239; 46 L. J. C. P. 438; 36 L. T. 180; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; 54 L. J. Ch. 454; 52 L. T. 942; *Jones* v. *Llanrwst Urban Council*, [1911] 1 Ch. 393; 80 L. J. Ch. 145; 103 L. T. 751; 27 T. L. R. 133.

(*d*) *West* v. *Bristol Tramways Co.*, [1908] 2 K. B. 14; 77 L. J. K. B. 684; 99 L. T. 264; 24 T. L. R. 478.

(*e*) *Crowhurst* v. *Amersham Burial Board*, 4 Ex. D. 5; 48 L. J. Ex. 109; 39 L. T. 355.

(*f*) *Firth* v. *Bowling Iron Co.*, 3 C. P. D. 254; 47 L. J. C. P. 358; 38 L. T. 568.

(*g*) *Att.-Gen.* v. *Cory Bros. & Co.*, [1921] 1 A. C. 521; 90 L. J. Ch. 221; 125 L. T. 98; 37 T. L. R. 343.

(*h*) *Rainham, etc., Works, Ltd.* v. *Belvedere, etc., Co.*, [1921] 2 A. C. 465; 90 L. J. K. B. 1252; 37 T. L. R. 973.

operations on the defendant's land and causing damage to adjoining property (*i*).

It applies not only where the defendant has brought upon his land that which has escaped and done mischief, but where, though he did not in the first instance bring it upon his land, he has by any artificial means accumulated it there—as, for example, where the defendant raised on his land a large mound of earth and rubble, which collected and accumulated water and caused it to flow into the plaintiff's land in a manner in which it would not have done but for the artificial erection on the defendant's land (*k*).

But the principle does not apply unless the defendant has used his land for a *non-natural use*, for the purpose of introducing into it or collecting upon it *that which in its natural condition was not in or upon it* (*l*). A landowner is not therefore liable if, as a result of the natural user of his land, water which naturally exists or accumulates there, flows by gravitation into his neighbour's land. Thus, in the case of *Smith* v. *Kernick* (*m*), the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that water percolating through the upper mine flowed into the lower mine. It was held that the owner of the lower mine had no ground of complaint, the defendant having a right to remove all his coal, and the damage to the plaintiff being caused by the natural percolation of water from the upper strata against which the defendant was not bound to protect the plaintiff. But, in the case of *Baird* v. *Williamson* (*n*), where the defendant altered the condition of his land by pumping water

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(*i*) *Hoare & Co.* v. *McAlpine*, [1923] 1 Ch. 167; 92 L. J. Ch. 81; 128 L. T. 526; 39 T. L. R. 927.

(*k*) *Broder* v. *Saillard*, 2 Ch. D. 692; 45 L. J. Ch. 414; *Hurdman* v. *North Eastern Railway*, 3 C. P. D. 168; 47 L. J. C. P. 368; 38 L. T. 339. Compare, however, *West Cumberland, etc., Co.* v. *Kenyon*, 11 Ch. D. 782; 48 L. J. Ch. 793; 40 L. T. 703, where the last-mentioned case is distinguished and explained.

(*l*) *Rylands* v. *Fletcher*, L. R. 3 H. L., at p. 339.

(*m*) 7 C. B. 515; 18 L J. C. P. 172.

(*n*) 15 C. B. (N.S.) 376; 33 L. J. C. P. 101; 9 L. T. 412. This and the preceding case are compared and discussed in *Rylands* v. *Fletcher*. Another pair of cases, in the first of which the defence of natural user succeeded, and in the second of which it failed, is *Wilson* v. *Waddell*, 2 A. C. 95; 35 L. T. 639; and *Fletcher* v. *Smith*, 2 A. C. 781; 47 L. J. Ex. 4; 37 L. T. 367.

from the lower levels of his mine to the upper levels, whence it flowed into the plaintiff's mine, it was held that he had no right thus to interfere with the gravitation of the water. So also a defendant is not liable for the escape of thistle seeds growing naturally on his land (*o*), nor for the escape of wild rabbits (*p*), nor for the fall of a branch of a tree which is the natural growth of his land and is not known to be in a dangerous condition (*q*), nor is he liable, in the absence of any default or negligence on his part, for damage caused by the escape of gas or water from ordinary domestic fittings (*r*). But although a person is not liable for the mere escape of something which he did not bring on his land, he will be liable if he actively transfers to his neighbour a mischievous substance which has collected on his land. Thus, where a quantity of rainwater accumulated against a railway embankment and the railway company, in order to protect the embankment, cut a trench through it which transferred the water to the plaintiff's land, it was held that the company was liable for the damage so done (*s*). On the other hand, a land-

(*o*) *Giles* v. *Walker*, 24 Q. B. D. 656; 59 L. J. Q. B. 416; 62 L. T. 933. See also *Wilson* v. *Newberry*, L. R. 7 Q. B. 31; 41 L. J. Q. B. 31; 25 L. T. 695.

(*p*) *Boulston's Case* (1597), 5 Co. Rep. 104b. But an action may be maintained against any person who *collects* animals upon his land so as to injure his neighbour's crops (*Farrer* v. *Nelson*, 15 Q. B. D., at p. 260; 54 L. J. Q. B. 385; 52 L. T. 766). In the case of *Stearn* v. *Prentice Brothers, Ltd.*, [1919] 1 K. B. 394; 88 L. J. K. B. 422; 35 T. L. R. 207, the defendant was a bone manufacturer, and for the purposes of his business had upon his land a quantity of bones that attracted rats, which made their way from his land to the plaintiff's land and ate the latter's corn. *Held*, in the absence of any evidence that the bones kept by the defendant were excessive or unusual in quantity, that the plaintiff had no cause of action against him.

(*q*) *Noble* v. *Harrison* (*ante*, p. 561). In the case of *Smith* v. *Giddy*, [1904] 2 K. B. 448; 73 L. J. K. B. 894; 91 L. T. 296; 20 T. L. R. 596, it was held that an action would lie against a landowner for allowing his trees to overhang his boundary and interfere with his neighbour's fruit trees, and the judgment was apparently based upon the decision in *Crowhurst* v. *Amersham Burial Board* (*ubi supra*), where, however, the damage was caused by yew trees *planted* by the defendant, projecting branches of which were eaten by the plaintiff's cattle. It does not appear whether, in the case of *Smith* v. *Giddy*, the trees were the natural growth of the land or were planted by the defendant, and it is submitted that while damage caused by overhanging branches of trees which are the natural growth of the land may amount to a nuisance (*Lemmon* v. *Webb*, [1894] 3 Ch., at p. 24, see also *ante*, p. 553), it does not create liability under the rule in *Rylands* v. *Fletcher*.

(*r*) *Rickards* v. *Lothian*, [1913] A. C. 263; 82 L. J. P. C. 142; 101 L. T. 225; 29 T. L. R. 281.

(*s*) *Whalley* v. *Lancashire and Yorkshire Railway*, 13 Q. B. D. 131; 53 L. J. Q. B. 285; 50 L. T. 472.

owner is not liable if, as a result of protective measures which he takes to prevent a dangerous substance from getting on his land, it gets on to his neighbour's land in greater quantities than it would otherwise have done (*t*).

Nor does the principle apply—

(i) Where the escaping substance was brought or accumulated upon the defendant's land for the joint benefit of himself and the plaintiff, as, *e.g.*, rainwater stored by a landlord in a cistern for the benefit of himself and a tenant occupying the same premises (*u*).

(ii) Where the escaping matter was brought upon the defendant's land by the consent of the plaintiff (*x*).

(iii) Where the cause of its escape was the act of God or the King's enemies, or the malicious act of a third person (*y*).

Finally, it must again be emphasised that the liability under the rule in *Rylands* v. *Fletcher* is *additional* to the ordinary liability for negligence, and that any owner or occupier of land who executes on his land work which entails the risk of injury to his neighbours is bound to take every reasonable precaution to protect his neighbours from injury (*z*); and, in dealing with things that are likely to cause damage unless adequate precautions are taken, the line of demarcation between the proof of negligence and the proof of what is necessary to bring such a

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(*t*) *Ante*, p. 505; and see *Greyvensteyn* v. *Hattingh*, [1911] A. C. 355; 80 L. J. P. C. 158; 104 L. T. 360, where the defendant was held not liable because in driving a flight of locusts away from his farm he had turned their course of flight to the plaintiff's land.

(*u*) *Carstairs* v. *Taylor*, L. R. 6 Ex. 217; 40 L. J. Ex. 129; *Ross* v. *Fedden*, L. R. 7 Q. B. 661; 41 L. J. Q. B. 270; 26 L. T. 966; *Anderson* v. *Oppenheimer*, 5 Q. B. D. 602; 49 L. J. Q. B. 708; *Blake & Co.* v. *Woolf*, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813; 79 L. T. 188.

(*x*) *Gill* v. *Edouin*, 72 L. T. 579; *Blake & Co.* v. *Woolf* (*ubi supra*). In the latter case it was held that a tenant who rents premises supplied by water from his landlord's cistern consents to the storage of the water in the cistern (*id.*).

(*y*) *Rickards* v. *Lothian*, [1913] A. C., at p. 278; 82 L. J. P. C. 142; 101 L. T. 225; 29 T. L. R. 281; and see *West* v. *Bristol Tramways Co.*, *ante*, p. 599. For an instance of the act of God, see *Nichols* v. *Marsland*, 2 Ex. D. 1; 46 L. J. Ex. 174; 35 L. T. 725.

(*z*) *Dodd* v. *Holme*, 1 Ad. & E. 493; 40 R. R. 344; *Bower* v. *Peate*, 1 Q. B. D. 321; 45 L. J. Q. B. 446; 35 L. T. 321; *Hughes* v. *Percival*, 8 A. C. 443; 52 L. J. Q. B. 719; 49 L. T. 189.

case within the principle of *Rylands* v. *Fletcher* is but a faint one (*a*).

2. *Duties towards persons upon the land or premises.*—Here, omitting the case of a trespasser, to whom there are ordinarily no obligations, the three possible standards of obligation are (i) an absolute obligation to keep the premises reasonably safe; (ii) an obligation to take reasonable care to keep the premises reasonably safe; (iii) an obligation not to set or have traps (*b*).

(i) *Contractual liabilities.*—"Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises *are as safe for that purpose as reasonable care and skill on the part of anyone can make them.* The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care and skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises. . . . But, subject to this limitation, it matters not whether the lack of care or skill be that of the defendant or his servants or that of an independent contractor or his servants, or whether the negligence takes place before or after the occupation by the defendant of the premises. The principle . . . applies alike to premises and to vehicles. It matters not whether the subject be a race-stand, a theatre, or an inn; whether it be a taxicab, an omnibus, or a railway carriage" (*c*).

(*a*) *Att.-Gen.* v. *Cory Bros. & Co.*, [1921] 1 A. C., at p. 536; 90 L. J. Ch. 221; 125 L. T. 98; 37 T. L. R. 443.

(*b*) See *Dunster* v. *Hollis*, [1918] 2 K. B., at p. 796; 88 L. J. K. B. 331; 120 L. T. 109.

(*c*) *Maclenan* v. *Segar*, [1917] 2 K. B., at p. 333; 86 L. J. K. B. 1113; 117 L. T. 376; 33 T. L. R. 351 (reviewing all the earlier authorities); *Hayward* v. *Drury Lane Theatre*, [1917] 2 K. B., at p. 914; 87 L. J. K. B. 18; 117 L. T. 523; 33 T. L. R. 557. The defendant may also in such cases be liable for his own ordinary negligence in failing to take such steps or make such enquiries as would have revealed the defects in question ([1917] 2 K. B., at p. 334). The rule given in the text does not, of course, apply as between landlord and tenant (*ante*, p. 460); certain special liabilities of landlords are, however, dealt with later.

(ii) *Liabilities toward trespassers, licensees and invitees* (*d*).—These liabilities are in an ascending scale, the greatest being that towards an invitee.

Trespassers.—The general rule is that a man "trespasses at his own risk": if without right or invitation he goes on the lands of another for his own purposes, he must take the lands as he finds them and cannot throw any responsibility upon the person on whose lands he has trespassed.

The same rule applies to trespass by cattle (*e*) unless the owner of the land was, by prescription, contract or statute, under an obligation towards the plaintiff to fence against his cattle (*f*).

But an owner of land is liable to trespassing human beings and animals if he causes them injury by any unlawful act (*g*), or

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(*d*) For these three classes see *Latham* v. *Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398; 82 L. J. K. B. 258; 108 L. T. 4; *Hayward* v. *Drury Lane Theatre* (*ubi supra*), and *Sutcliffe* v. *Clients Investment Co.*, [1924] 2 K. B. 746; 94 L. J. K. B. 113; 132 L. T. 83; 40 T. L. R. 765 (explaining *Fairman* v. *Perpetual, etc., Society*, [1923] A. C. 74; 92 L. J. K. B. 50; 128 L. T. 386; 39 T. L. R. 54), in each of which all the most important of the earlier authorities are reviewed. In the case of *Norman* v. *Great Western Railway*, [1915] 1 K. B. 584; 84 L. J. K. B. 598; 112 L. T. 266, it was held by the Divisional Court that there was a fourth class—*i.e.*, the owner of premises who, as in the case of a railway company, is bound to admit persons to his premises, and is therefore under a greater liability than that of an invitor. It was, however, held by the Court of Appeal that the liability in such a case is merely that of an invitor.

(*e*) *Ponting* v. *Noakes*, [1894] 2 Q. B. 281; 68 L. J. Q. B. 549; 70 L. T. 842.

(*f*) *Lawrence* v. *Jenkins*, 8 Q. B. 274; 42 L. J. Q. B. 147; 28 L. T. 406; *Holgate* v. *Bleazard*, [1917] 1 K. B. 443; 86 L. J. K. B. 270; 115 L. T. 788; 33 T. L. R. 166. The fact that a tenant has covenanted with his landlord to keep fences in repair does not impose upon him any liability towards third persons (*id.*). Railway companies, by s. 68 of the Railway Clauses Consolidation Act, 1845, are bound to fence out the cattle of adjoining owners (see *Child* v. *Hearn*, L. R. 9 Ex. 176; 43 L. J. Ex. 100; *Wiseman* v. *Booker*, 3 C. P. D. 184; 38 L. T. 292; *Corry* v. *Great Western Railway*, 7 Q. B. D. 322; 50 L. J. Q. B. 386; 44 L. T. 701). But they are not bound to fence against cattle *straying* upon the highway and not merely passing along it (*Luscombe* v. *Great Western Railway*, [1899] 2 Q. B. 313; 68 L. J. Q. B. 711; 81 L. T. 183).

(*g*) *Hardy* v. *Central London Ry.*, [1920] 3 K. B., at p. 473; 89 L. J. K. B. 1187; 124 L. T. 136; 36 T. L. R. 843; see also *Degg* v. *Midland Ry.*, 1 H. & N., at p. 780; 26 L. J. Ex. 171; 108 R. R. 816. To set spring-guns calculated to cause serious injury to human beings is unlawful at Common Law (*Bird* v. *Holbrook*, 4 Bing. 628; 6 L. J. (o.s.) C. P. 146; 29 R. R. 657); and, unless set at night for the protection of dwelling-houses, by statute (7 & 8 Geo. 4, c.18). But to set a mere alarm-gun not capable of causing such injury is not illegal either at Common Law or by the statute (*Wootton* v. *Dawkins*, 2 C. B. (N.S.) 412; 109 R. R. 733). Nor is a spear set for the purpose of destroying dogs (*Jordin* v. *Crump*, 8 M. & W. 782; 11 L. J. Ex. 74; 90 R. R. 929). But a person is not justified in shooting a trespassing dog unless he *bona fide*

if he entices them upon his land with the intent that they shall be injured (*h*), or in the case of land adjoining the highway, if injury is caused to them by anything dangerous to persons accidentally deviating from the highway as, *e.g.*, an unprotected excavation abutting thereon (*i*).

Licensee and invitees (*k*).—A *licensee* is a person who is upon land or premises with the consent of the owner or occupier (*l*): He may be either a bare licensee, such as a guest, or a licensee with an interest as, *e.g.*, a consignee of goods who, by permission of a station master is allowed to go on to the premises of a railway company in order to assist in the unloading of his goods (*m*). An *invitee* is a person who is "invited into the premises by the owner or occupier for some purpose of business or of material interest" (*n*). A licence or invitation need not be express, but may be inferred from conduct. Thus, an open shop invites customers, and a licence to enter a field may be inferred from the fact that it is frequently entered with the knowledge of and without objection by the owner or occupier (*o*).

A mere *licensee* must take the premises as he finds them; he is not entitled to be protected against existing risks but only against new traps created by the owner or occupier (*p*).

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believes that it is necessary for the protection of his property (*Miles* v. *Hutchings*, [1903] 2 K. B. 714; 72 L. J. K. B. 775; 89 L. T. 420).

(*h*) *Townsend* v. *Wathen*, 10 East, 277; 9 R. R. 553.

(*i*) *Barnes* v. *Ward*, 9 C. B. 392; 19 L. J. C. P. 195; 82 R. R. 375. Compare, however, *Hardcastle* v. *South Yorkshire Railway Co.*, 4 H. & N. 67; 28 L. J. Ex. 139, where the defendant was held not liable to a trespasser who had wandered some distance from the highway before falling into an excavation on his land. See also *Mersey Docks, etc.*, v. *Procter*, [1923] A. C. 253; 92 L. J. K. B. 478; 129 L. T. 34; 39 T. L. R. 275.

(*k*) See *Latham* v. *Johnson & Nephew* (*ubi supra*); *Hayward* v. *Drury Lane Theatre*, [1917] 2 K. B., at pp. 913, 914; 87 L. J. K. B. 18; 117 L. T. 523; 33 T. L. R. 557; *Mersey Docks, etc., Board* v. *Procter*, [1923] A. C. 253; 92 L. J. K. B. 479; 129 L. T. 34; 39 T. L. R. 275; *Sutcliffe* v. *Clients Investment Co.*, [1924] 1 K. B., at pp. 756, 757; 94 L. J. K. B. 113; 132 L. T. 83; 40 T. L. R. 765.

(*l*) A constable who sees that the door of premises is open at night and enters in order to see if everything is right is neither a licensee nor an invitee, and the owner of the premises is under no duty to guard him against traps (*Great Central Railway* v. *Bates*, [1921] 3 K. B. 578; 90 L. J. K. B. 1269).

(*m*) See *Holmes* v. *North Eastern Railway Co.*, L. R. 6 Ex. 123; 40 L. J. Ex. 121.

(*n*) [1913] 1 K. B., at pp. 410-413. In this paragraph the term "invitee" is used only of persons who are not upon premises by contractual right, to whom, however, it is also frequently applied. (*o*) *Ibid.*

(*p*) [1913] 1 K. B., at pp. 404, 405, 411; [1917] 2 K. B., at p. 913;

The rights of an *invitee* and of a licensee with an interest are defined in the leading case of *Indermaur* v. *Dames* (*q*), and are, that the owner or occupier of the premises must use reasonable care to protect him, either by warning or precaution, against traps, whether existing or new (*r*).

" The difference between the bare licensee and the invitee or licensee with an interest is that as to existing traps the owner incurs liability to the latter and not to the former " (*s*). In other words, the owner or occupier of premises must not *set* a trap for his bare licensee and must take reasonable care not to *have* a trap for his invitee or licensee with an interest, a trap being a non-apparent danger of which the injured person had no knowledge or notice, and which he could not avoid by reasonable care and skill (*t*).

The obligation of an invitor is not, however, confined to the structure of the building. Thus, the lessee of a theatre is bound to take reasonable care that the performance of the play does not expose the audience to unusual danger of which he knew or ought to have known (*u*).

Independently of any obligation arising from the ownership or occupation of premises, if a person *creates* a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning (*x*).

[1923] A. C., at pp. 271, 274; [1924] 2 K. B., at p. 756. See also *Lowery* v. *Walker*, [1911] A. C. 10; 80 L. J. K. B. 138; 103 L. T. 674; 27 T. L. R. 83, where the " trap " was a dangerous horse put without warning by the defendant in his field, which he allowed the public to cross.

(*q*) L. R. 2 C. P. 311; 36 L. J. C. P. 181; 16 L. T. 293.

(*r*) [1913] 2 K. B., at p. 412; [1917] 2 K. B., at p. 914; [1924] 2 K. B., at p. 757.

(*s*) [1917] 2 K. B., at p. 914.

(*t*) L. R. 2 C. P., at p. 313; [1917] 2 K. B., at p. 914; *Cavalier* v. *Pope*, [1906] A. C., at p. 432; 75 L. J. K. B. 609; 95 L. T. 65; 22 T. L. R. 648; *Fairman* v. *Perpetual, etc., Society*, [1923] A. C., at p. 83; 92 L. J. K. B. 50; 128 L. T. 386; 39 T. L. R. 54.

(*u*) *Cox* v. *Coulson*, [1916] 2 K. B. 177; 85 L. J. K. B. 1081; 114 L. T. 599; 32 T. L. R. 406. But even though the invitee is present by a contractual right, the lessee of the theatre does not warrant that the performance shall be conducted with reasonable care, so as to be liable for negligent acts on the part of the performers, who are not his servants (*id.*).

(*x*) *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K. B. 439; 87 L. J. K. B.

Liabilities towards children.—The liabilities of an owner or occupier of premises are no greater towards children than towards adults, though a different inference may have to be drawn from facts when dealing with the case of an infant than when dealing with an adult. Accordingly

(i) Where an infant is in fact a trespasser the mere fact that the trespass was caused by something attractive to a child (as distinct from a malicious allurement with intent to injure) gives it no greater rights.

(ii) But an allurement or even the absence of sufficient precautions to warn and keep children off premises is a material element in considering whether an invitation or licence is to be inferred. And

(iii) When a child is on land or premises as of right or by leave the presence of some "fascinating and fatal" object of attraction, tempting him to meddle, may constitute a trap (*y*).

Special liabilities of landlords.—A landlord who lets premises to several tenants, retaining control of a staircase or approach which is common to all the tenants, has the liability of a licensor towards persons having business with his tenants (*z*). He is, therefore, bound not to *lay* any trap for them upon such staircase or approach (*a*), but he is not liable for apparent and obvious dangers (*b*).

751; 118 L. T. 562; 34 T. L. R. 261 (workmen engaged in altering a house made a dangerous hole, which they left unfenced and unguarded. The plaintiff, who had an order to view the house, fell into the hole and was injured. *Held*, that the employer of the workmen was liable).

(*y*) See *Latham* v. *Johnson* (*ubi supra*); *Hardy* v. *Central London Railway*, [1920] 3 K. B. 459; 89 L. J. K. B. 1187; 124 L. T. 136; 36 T. L. R. 843. For examples of facts constituting an invitation or licence to children, see *Cooke* v. *Midland Great Western Railway*, [1909] A. C. 229; 78 L. J. P. C. 76; 100 L. T. 626; 25 T. L. R. 375, and *Jenkins* v. *Great Western Railway*, [1912] 1 K. B. 525; 81 L. J. K. B. 378; 105 L. T. 822. It has, in subsequent cases, been stated that the headnote to the case of *Cooke* v. *Midland, etc., Railway* is inaccurate in speaking of the children as trespassers (see [1912] 1 K. B., at p. 534; [1913] 1 K. B., at p. 418; [1920] 3 K. B., at p. 467, and *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C., at p. 53).

(*z*) *Fairman* v. *Perpetual, etc., Society*, [1923] A. C. 74; 92 L. J. K. B. 50; 128 L. T. 386; 39 T. L. R. 54 (overruling *Miller* v. *Hancock*, [1893] 2 Q. B. 177; 69 L. T. 214). But such visitors may be invitees of the *tenants* ([1923] A. C., at p. 85).

(*a*) [1923] A. C., at pp. 86, 92.

(*b*) Thus he is not liable for injuries caused to a visitor by an unlighted staircase (*Huggett* v. *Miers*, [1908] 2 K. B. 278; 77 L. J. K. B. 710; 99 L. T.

Towards his tenants his liability is midway between that of an invitor and that which usually arises towards persons who are upon premises under contractual rights. He does not warrant that the staircase or approach is as safe as reasonable care and skill can make it, but is merely under an obligation to take reasonable care to keep it in a reasonably safe condition (*c*). And he is under a similar obligation with regard to all parts of the premises which he retains in his own possession and under his own control. Thus he must take reasonable care that the common roof covering all the premises and the guttering thereon is not in such a condition as to render the demised premises uninhabitable (*d*).

Dangerous Things.—" Anyone who

(i) leaves a dangerous instrument, as a gun, in such a way as to cause danger, or

(ii) without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing,

is liable for injury caused to others by reason of his negligent act " (*e*).

The first branch of this rule relates to cases " where dangerous things, or things capable of being dangerous if left exposed to the interference of others, have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to persons brought into contact with them. Such cases are *Illidge* v. *Goodwin* and *Lynch* v. *Nurdin* " (*f*). In the first of these cases

326; 24 T. L. R. 582), or by a staircase which has no railings (*Lucy* v. *Bawden*, [1914] 2 K. B. 318; 83 L. J. K. B. 523; 110 L. T. 580; 30 T. L. R. 321); or from which a railing is missing (*Dobson* v. *Horsley*, [1915] 1 K. B. 634; 84 L. J. K. B. 399; 112 L. T. 101; 31 T. L. R. 12).

(*c*) *Dunster* v. *Hollis*, [1918] 2 K. B. 795 (reviewing the earlier authorities).

(*d*) *Hargraves & Co.* v. *Hartopp*, [1905] 1 K. B. 472; 74 L. J. K. B. 233; 21 T. L. R. 226; *Cockburn* v. *Smith*, [1924] 2 K. B. 119; 93 L. J. K. B. 764; 131 L. T. 334; 40 T. L. R. 476 (reviewing the earlier authorities).

(*e*) *Heaven* v. *Pender*, 11 Q. B. D., at p. 517; 52 L. J. Q. B. 702; 49 L. T. 357.

(*f*) *Weld-Blundell* v. *Stephens*, [1920] A. C., at p. 985; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640.

the defendant left a horse and cart unattended in the street; the horse, being struck by a passer-by, backed into a shop window, and it was held that the defendant was liable for the damage so caused (*g*). In the second case also, a horse and cart were left unattended in the street and the plaintiff, a child under seven years of age, got upon the cart; another boy led the horse on and the plaintiff fell and was run over by the wheel of the cart: here again it was held that the defendant was liable (*h*).

In this class of cases the breach of duty consists in not anticipating and guarding against the acts of third persons: the defendant is therefore liable, although the chain of causation is broken and the accident would not have occurred but for the intervening act of a third person or of the plaintiff himself (*i*).

The second branch of the rule is illustrated by *Clarke* v. *Army and Navy Co-operative Society* (*k*). Here the plaintiff bought from the defendants a tin of chlorinated lime, which, on being opened, exploded and injured her eyes. There was evidence that the defendants knew that at least one similar accident had previously occurred, but no warning was given to the plaintiff on purchasing. It was held that, apart from any contractual liability, there is a duty cast upon a vendor, who knows or ought to know of the dangerous character of the goods which he is supplying, and also knows that the purchaser is not, or may not

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(*g*) *Illidge* v. *Goodwin*, 5 C. & P. 190; 38 R. R. 798.

(*h*) *Lynch* v. *Nurdin*, 1 Q. B. 29; 10 L. J. Q. B. 73. It has been suggested that this is a case of nuisance; but, as pointed out by Lord Macnaghten in *Cooke* v. *Midland Great Western Railway of Ireland* (*infra*; [1909] A. C., at p. 234), the point of nuisance was not suggested, the ground of the decision being negligence.

(*i*) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A. C., at p. 237; 78 L. J. C. P. 76; 100 L. T. 626; 25 T. L. R. 375; *Latham* v. *Johnson*, [1913] 1 K. B., at p. 413; 82 L. J. K. B. 258; 108 L. T. 4; 29 T. L. R. 124; *Glasgow Corporation* v. *Taylor*, [1922] 1 A. C. 44; 91 L. J. P. C. 49; 126 L. T. 262; 38 T. L. R. 102 (dangerous berries in a public park, eaten by a child). Other instances of this class of cases are *Dixon* v. *Bell*, 5 M. & S. 198; 17 R. R. 308 (in which the defendant left a loaded gun in charge of a servant-girl of fourteen years of age, who shot the plaintiff's son); *Clark* v. *Chambers*, 3 Q. B. D. 327; 47 L. J. Q. B. 427; 38 L. T. 454 (in which the defendant wrongfully placed in a private road a spiked barrier, which was moved by a third person on to the footpath, where it injured the plaintiff). For discussions of these and other similar cases, see *Latham* v. *Johnson* (*ubi supra*), and *Weld-Blundell* v. *Stevens* (*ubi supra*).

(*k*) [1903] 1 K. B. 155; 78 L. J. K. B. 153; 88 L. T. 1.

be, aware of it, not to supply the goods without giving some warning to the purchaser of that danger (*l*). Where a vendor is guilty of a breach of this duty he is liable not only to the immediate purchaser but to a third person; thus a manufacturer of a dangerous article who sells to a retailer is liable to a purchaser from the latter (*m*). The rule is not limited to goods which are the subject of a contract of sale, but applies to all cases where a dangerous animal or chattel is supplied for the use of another person. Thus in *White* v. *Steadman* (*n*), the plaintiff hired from the defendant a landau with a horse and driver for the purpose of taking a drive into the country. The horse was unsafe to be sent out owing to its propensity to shy, and during the drive it shied and upset the carriage. The jury having found that the defendant knew or ought to have known that the horse was unsafe to be sent out with the carriage, it was held that the defendant was liable for injuries caused to the plaintiff's wife, as he must have contemplated that she would use the carriage. But the liability towards third persons exists only in respect of things which are in themselves of a dangerous character, the question whether or not a particular object belongs to that category being a question of law for the Judge (*o*). Where a thing not dangerous in itself, such as a ginger-beer bottle or a brazing lamp, becomes dangerous through a defect occasioned by breach of contract in its manufacture, the mere "breach of the defendant's *contract* with A to use care and skill in and about the manufacture or repair of an article does not *of itself* give any cause of action to B, when he is injured by reason of the article proving to be defective in breach of that contract" (*p*).

(*l*) *Id.*, at p. 166.

(*m*) *Blacker* v. *Lake & Elliott, Ltd.*, 106 L. T. 533 (reviewing the authorities); *White* v. *Steadman*, [1913] 3 K. B., at p. 347; 82 L. J. K. B. 846; 109 L. T. 249; 29 T. L. R. 563.

(*n*) [1913] 3 K. B. 341; 82 L. J. K. B. 846; 109 L. T. 249; 29 T. L. R. 563.

(*o*) *Blacker* v. *Lake & Elliott, Ltd.* (*ubi supra*).

(*p*) *Id.*, at p. 536; *White* v. *Steadman*, [1913] 3 K. B., at p. 347; *Bates* v. *Batey & Co., Ltd.*, [1913] 3 K. B. 351; 82 L. J. K. B. 963; 108 L. T. 1036; 29 T. L. R. 616. The case of *George* v. *Skivington*, L. R. 5 Ex. 1; 39 L. J. Ex. 8; 21 L. T. 495, is no longer law so far as it decides that in the case of chattels which are *not* of a dangerous class the negligence of a person manufacturing or repairing them can be made the foundation of an action by a person towards whom he was under no contractual duty (106 L. T., at p. 540, where this case is fully discussed).

Fire.—" A man was liable at Common Law for damage done by fire originating on his own property (i) for the mere escape of the fire; (ii) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (iii) upon the principle of *Rylands* v. *Fletcher*. This principle was not then known by that name . . . but it was an existing principle of the Common Law " (*q*).

By s. 86 of the *Fires Prevention (Metropolis) Act*, 1774, which is of general application (*r*), it was provided that no action should lie against any person " in whose house . . . or other building, or on whose estate any fire shall . . . accidentally begin." This exception, however, applies only to the first ground of liability, it does not apply to a fire which was caused either deliberately or negligently (*s*), nor does it affect the liability on the principle of *Rylands* v. *Fletcher* (*t*). Accordingly, on this principle, where a person brings on his premises a dangerous thing, such as a motor car with a tank full of petrol, he keeps it at his peril and is liable for the consequences of any fire which it occasions (*u*).

A railway company, having unqualified statutory authority to use locomotives is not, in general, liable for damage caused by sparks from its engines (*x*), unless so caused by the negligence of its servants (*y*). But by s. 1 of the *Railway Fires Act*, 1905, as amended by s. 1 of the *Railway Fires Act Amendment Act*, 1923, if damage is caused to agricultural land or agricultural crops by fire arising from sparks or cinders emitted from any

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(*q*) *Musgrove* v. *Pandelis*, [1919] 2 K. B., at p. 46; 88 L. J. K. B. 915; 120 L. T. 601; 35 T. L. R. 219.

(*r*) *Filliter* v. *Phippard*, 11 Q. B. 347; 17 L. J. Q. B. 89; 75 R. R. 401.

(*s*) *Id.*

(*t*) *Musgrove* v. *Pandelis* (*ubi supra*). Nor, apparently, does the exception apply where the fire is a nuisance which the defendant has permitted to continue upon his property (*Job Edwards, Ltd.* v. *Birmingham Navigations*, [1924] 1 K. B., at p. 364; see *ante*, p. 561).

(*u*) *Id.* " The question may some day be discussed whether a fire spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does " (*per* Duke, L.J., [1919] 2 K. B., at p. 51).

(*x*) *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679; 29 L. J. Ex. 247; 2 L. T. 394; *Canadian Pacific Railway* v. *Roy*, [1902] A. C. 220; 71 L. J. P. C. 51; 86 L. T. 127.

(*y*) *Smith* v. *London and South Western Railway*, L. R. 6 C. P. 14; 40 L. J. C. P. 21; 23 L. T. 678.

locomotive engine used on a railway, the fact that the engine was used under statutory powers shall not affect liability in an action for such damages: this section does not, however, apply unless the claim for damage does not exceed £200. By s. 3 of the amendment Act it is provided that the principal Act shall not apply unless (i) notice in writing of the fire and of intention to claim in respect thereof has been sent to the railway company within seven days of the occurrence of the damage, and (ii) particulars in writing of the damage showing the amount of the claim in money not exceeding the sum of £200 have been sent to the railway company within twenty-one days of the occurrence of the damage (*z*).

Animals.—The responsibility of owners of animals for damage done by them has developed along two main lines, one a branch of the law of trespass, and the other a branch of the law which imposes on the owner of a dangerous animal or thing a duty to take measures to prevent it from doing damage (*a*).

As regards the first branch the rule is that the owner of animals in which the right of property can exist (as, *e.g.*, cattle, sheep and poultry), is bound to see that they do not stray on to the land of another person and, even without any negligence on his part, is liable for any trespass they may commit and for the natural consequences of their trespass (*b*), unless the trespass is due to the failure of such other person to fence them out when he was under a legal obligation to do so (*c*), or unless the trespass occurred while they were being driven along the highway, in which case he is liable only if it was due to negligence or wilful intention on his part (*d*). But the owner of a dog or cat is not liable for

(*z*) Definitions of agricultural land and crops are contained in s. 4 of the principal Act.

(*a*) *Buckle* v. *Holmes*, [1926] 2 K. B., at p. 128; 95 L. J. K. B. 547; 134 L. T. 743; 42 T. L. R. 369. For the purposes of the following rules the term "owned" includes any one keeping the animal, whether or not he is the actual owner (*McKone* v. *Wood*, 5 C. & P. 1; 38 R. R. 787).

(*b*) *Cox* v. *Burbidge*, 13 C. B. (N.S.) 430; 32 L. J. C. P. 89; 134 R. R. 586; *Lee* v. *Riley*, 18 C. B. (N.S.) 722; 34 L. J. C. P. 212; 12 L. T. 388; 144 R. R. 644; *Ellis* v. *Loftus Iron Co.*, L. R. 10 C. P. 10; 44 L. J. C. P. 24; 31 L. T. 483; *Buckle* v. *Holmes* (*ubi supra*).

(*c*) *Ante*, p. 604.

(*d*) *Gayler & Pope, Ltd.* v. *Davies & Son, Ltd.*, [1924] 2 K. B. 75, and see *ante*, pp. 496, 497. For an example of negligence, see *Jones* v. *Owen*, 24 L. T. 587.

its trespass or their natural consequences (*e*), though he may under the second branch, be liable for damage done by it when trespassing if he has knowledge of a special mischievous tendency on its part to do such damage (*f*).

In cases where liability does not arise out of trespass to land, the law recognises two distinct classes of animals, namely, (i) those which from the experience of mankind are dangerous, whether or not they are *feræ naturæ* so far as the rights of property are concerned; and (ii) those which, according to common experience, are not dangerous, such as sheep, horses and dogs (*g*).

A person who keeps an animal of the first class does so at his peril; he is presumed to know the propensities of the *class* to which it belongs, and is liable for all mischief done by it, although he has not been guilty of any negligence and although he did not in fact know that the particular animal had any mischievous propensities (*h*). As to animals which are not naturally dangerous or mischievous, the person keeping them is, at Common Law, liable only in respect of such dangerous or mischievous propensities as are known to him (*i*). Thus, in the case of a dog, if it bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible, but the party injured has no remedy unless the *scienter* can be proved (*k*).

(*e*) *Brown* v. *Giles*, 1 C. & P. 118; 28 R. R. 769; *Sanders* v. *Teape*, 51 L. T. 263. Thus the owner of a cat is not responsible when it trespasses and does damage which merely consists in following a *natural* propensity of its kind, *e.g.*, the propensity to kill fowls or pigeons (*Buckle* v. *Holmes* (*ubi supra*)).

(*f*) See *Read* v. *Edwards*, *infra*.

(*g*) *Cox* v. *Burbidge*, 13 C. B. (N.S.), at p. 439; *Filburn* v. *People's Palace, etc., Co.*, 25 Q. B. D. 258; 59 L. J. Q. B. 471; *Manton* v. *Brocklebank*, [1923] 2 K. B. 212; 92 L. J. K. B. 624; 129 L. T. 135; 39 T. L. R. 344.

(*h*) *Filburn* v. *People's Palace, etc., Co.* (*ubi supra*) (elephant not known to be dangerous); and see *May* v. *Burdett*, 9 Q. B. 101; 16 L. J. Q. B. 64; 72 R. R. 189 (plaintiff bitten by a monkey: *held*, that negligence need not be alleged).

(*i*) *Manton* v. *Brocklebank* (*ubi supra*).

(*k*) *Cox* v. *Burbidge*, 13 C. B. (N.S.), at p. 436. See *Read* v. *Edwards*, 17 C. B. (N.S.) 245; 34 L. J. C. P. 31; 11 L. T. 311; 142 R. R. 324, where a dog having trespassed and killed game, the owner was held liable, having knowledge of its propensity to do so. Compare, however, *Buckle* v. *Holmes* (*ante*, p. 612). The fact that a dog has bitten human beings is no evidence of a propensity to worry sheep (*Hartley* v. *Harriman*, 1 B. & Ald. 620); and the fact that it has bitten a goat is no evidence that it is dangerous to human beings (*Osborn* v. *Chocqueel*, [1895] 2 Q. B. 109; 65 L. J. Q. B. 534; 74 L. T. 786).

In order, however, to render the owner of a dog liable for damages due to its having bitten a human being, it is not necessary to prove that it has actually bitten or attempted to bite anyone else; it is sufficient to show that it is, to the owner's knowledge, ferocious towards *human* beings; and, even though it is not generally ferocious, it is sufficient to show that it is, to the knowledge of the owner, ferocious in certain circumstances which were in existence when it bit the plaintiff, as, *e.g.*, at times when it has puppies (*l*).

If the owner of an animal appoints a servant to keep it, the servant's knowledge of its ferocity is the knowledge of the master whether communicated to him or not (*m*). In other cases, the knowledge of a servant does not necessarily affect his master, but a complaint made to a servant of the ferocity of an animal kept upon premises where he is managing or conducting business for his master, may be some evidence of the master's *scienter* (*n*).

Where an animal does not belong to a dangerous class but is known to be dangerous, the liability of its owner is the same as if it belonged to a dangerous class, so that he is bound to keep it secure at his peril, and is liable even though the immediate cause of any injury done by it is the intervening act of some third person (*o*).

(*l*) *Worth* v. *Gilling*, L. R. 2 C. P. 1; *Osborn* v. *Chocqueel* (*ubi supra*); *Barnes* v. *Lucile, Ltd.*, 96 L. T. 680; 23 T. L. R. 389. See also *Hudson* v. *Roberts*, 6 Ex. 679; 20 L. J. Ex. 299; 86 R. R. 438 (bull that had a propensity to run at anything red; plaintiff wearing a red handkerchief; owner held liable). In the case of *Clinton* v. *J. Lyons & Co., Ltd.*, [1912] 3 K. B. 198; 81 L. J. K. B. 923; 106 L. T. 988; 28 T. L. R. 462, the plaintiff, accompanied by a dog, entered a teashop where there was a cat with kittens, which bit the dog and also bit the plaintiff when she lifted up the dog. It was held that the defendants were not liable for the injuries to the plaintiff herself, because there was no evidence that cats with kittens are dangerous to human beings who bring dogs into shops, nor were they liable for the injuries to the dog, because though "cat and dog will fight whether the cat has kittens or not . . . it would be ridiculous to hold that for that reason every person who keeps a dog or a cat does so at his peril." It was also held that the defendants were not invitors of the plaintiff accompanied by her dog, or liable on that ground, but that the plaintiff and the dog were mere licensees.

(*m*) *Baldwin* v. *Casella*, L. R. 7 Ex. 325; 41 L. J. Ex. 167; 26 L. T. 707.

(*n*) *Applebee* v. *Percy*, L. R. 9 C. P. 647; 43 L. J. C. P. 365; 30 L. T. 785, distinguishing *Stiles* v. *Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310, where the knowledge of servants of the defendant, not having any control over their business or over the dog, was held to afford no evidence of *scienter*.

(*o*) *Baker* v. *Snell*, [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 24 T. L. R. 599 (defendant held liable for the act of his servant, who incited a savage

In the case of injury by dogs to cattle, the Common Law rule of liability is modified by the *Dogs Act*, 1906, which provides that " the owner of a dog shall be liable in damages for injury done to any *cattle* by that dog; and it shall not be necessary for the person seeking such damages to show a previous mischievous propensity in the dog, or the owner's knowledge of such propensity, or to show that the injury was attributable to neglect on the part of the owner " (*p*). By s. 7 of the Act, the word " cattle " includes horses, mules, asses, sheep, goats and swine.

It must be noticed that, apart from the absolute liability which rests upon the owner of an animal which he knows to be ferocious, he may also be liable for any damage caused by his animals through his own negligence, and in such a case the doctrine of *scienter* has no application. Thus, in the case of *Smith* v. *Cook* (*q*), the defendant being the bailee of a colt and being therefore bound to take reasonable care of it, put it in a field with some heifers, where it was killed by a bull which was in the habit of visiting the heifers. The jury having found that the defendant acted without reasonable care in putting the colt into the field, it was held that he was liable, although there was no evidence that the bull was of a mischievous disposition.

Animals straying on highways.—At Common Law the owner or occupier of land adjoining a highway is under no duty to fence so as to keep his domestic animals off the highway, though some special duty may be imposed by a local Inclosure Act, or by

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dog to attack the plaintiff). In *Nichols* v. *Marsland* (L. R. 10 Ex., at p. 260; 46 L. J. Ex. 174). Baron Bramwell said. " I am by no means sure that if a man kept a tiger, and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable." See, however, the dissenting judgment of Kennedy, L.J., in *Baker* v. *Snell*; see also *Rickards* v. *Lothian*, [1913] A. C., at p. 278 (cited *ante*, p. 601).

(*p*) 6 Edw. 7, c. 32, s. 1 (1), repealing and replacing the Dogs Act, 1865 (28 & 29 Vict. c. 60). By s. 1 (2), the occupier of any house or premises where the dog was permitted to live or remain at the time of the injury is presumed to be the owner, and is liable for the injury unless he proves that he was not the owner at the time. By s. 1 (3), if the damages do not exceed £5 they may be recovered under the Summary Jurisdiction Acts as a civil debt. The Act of 1865 was held to apply even though the cattle were trespassing at the time of the injury (*Grange* v. *Silcock*, 77 L. T. 340). Under the same Act it was held that an innkeeper was liable for injuries to cattle caused by a dog which was under the control of a person staying in the inn, to whose care it had been entrusted by the owner (*Gardner* v. *Hart*, 44 W. R. 527).

(*q*) 1 Q. B. D. 79; 45 L. J. Q. B. 122; 33 L. T. 722. Compare *Lee* v. *Riley*, *ante*, p. 612; *Manton* v. *Brocklebank* (*ubi supra*).

prescription or otherwise. Accordingly, in the absence of any such special duty, he is not liable, either on the ground of negligence or as for a nuisance to the highway, merely because damage is caused by the collision of other traffic with his ordinary domestic animals upon the highway (*r*). But he will be liable if he is guilty of negligence in allowing an animal of *particular* dangerous propensities to be on the highway in circumstances under which it is likely to do harm, as, *e.g.*, if he takes an unbroken colt along the highway at night without having it under proper control, and, being startled by a light on a bicycle, it bolts across the road and kicks the rider of the bicycle (*s*).

Carriers.—The liability of carriers of goods has already been considered (*t*).

Carriers of *passengers*—

(i) are subject to the contractual liabilities already described (*u*),

(ii) are also liable as invitors (*x*);

(iii) are also liable for any acts of negligence by their servants (*y*).

There was at one time a number of cases in which passengers were injured through alighting from a train which had not been drawn up to, or had passed, the platform. In these cases, which are not now of such frequent occurrence, the test of the railway company's liability is whether it gave the plaintiff an "invitation to alight" at the spot where he alighted, under circumstances which made it negligent in them to give it, and the injury

(*r*) *Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K. B. 370; 85 L. J. K. B. 1289; 115 L. T. 129; 32 T. L. R. 570 (reviewing all earlier authorities); see, however, particularly, *Ellis* v. *Banyard*, 106 L. T. 51; *Jones* v. *Lee*, 106 L. T. 123.

(*s*) *Turner* v. *Coates*, [1917] 1 K. B. 670; 86 L. J. K. B. 321; 115 L. T. 766; 33 T. L. R. 79, distinguishing *Heath* v. *Hodges* (*ubi supra*), where the owner of sheep was held not liable for damages caused by their collision, in the daytime, with a motor car, sheep being harmless animals, not likely to collide with a motor car, whereas colts, when startled, have a tendency to rush about and kick.

(*t*) *Ante*, p. 305.

(*u*) *Ante*, p. 603.

(*x*) See *Norman* v. *Great Western Railway* (*ante*, p. 604, n. (*d*)).

(*y*) See, *e.g.*, *Metropolitan Railway* v. *Jackson* (*ante*, p. 594) (negligence by overcrowding trains); *Metropolitan Railway* v. *Delaney*, [1921] W. N. 118; 90 L. J. K. B. 721; 125 L. T. 472; 37 T. L. R. 520 (negligence by starting a train improperly).

happened to him in so alighting without any negligence on his part (*z*).

Master and Servant.—The liability of a master to his servant has to be considered (1) at Common Law; (2) under the Employers' Liability Act; (3) under the Workmen's Compensation Acts.

1. **Common Law.**—At Common Law a servant was deemed to take the ordinary risks of the work for which he was employed, but his master was bound to so carry on his business as not to expose his workmen to unnecessary risks, and was liable for any injury caused to a workman by his negligence (*a*). Thus an employer was, and still is, liable for injuries caused through "want of care in the selection of proper servants" (*b*), or through failure to take "reasonable care to provide proper appliances and to maintain them in a proper condition" (*c*), or through his own negligent acts (*d*) or orders (*e*), or "where the employment involves the handling by the servant of machinery which . . . may prove dangerous to the servant, unless he is instructed," for failure "to take reasonable care to avert that danger by such instruction as will be sufficient to enable the servant to avoid the danger" (*f*). A master is also liable at Common Law for any

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(*z*) See *Ross* v. *North Eastern Railway*, 2 Ex. D. 248; *Robson* v. *North Eastern Railway*, 2 Q. B. D. 85; 46 L. J. Q. B. 50 (reviewing earlier authorities); *Sharpe* v. *Southern Railway Co.*, [1925] 2 K. B. 311; 94 L. J. K. B. 913; 133 L. T. 693.

(*a*) See *Thomas* v. *Quartermaine*, 18 Q. B. D., at p. 691; 56 L. J. Q. B. 340; 57 L. T. 357; *Smith* v. *Baker & Sons*, [1891] A. C., at p. 339; 60 L. J. Q. B. 683; 65 L. T. 467.

(*b*) *Tarrant* v. *Webb*, 18 C. B., at p. 805; 25 L. J. C. P. 261; 107 R. R. 521.

(*c*) *Smith* v. *Baker & Sons*, [1891] A. C., at pp. 339, 353; 60 L. J. Q. B. 683; *Monaghan* v. *Rhodes & Son*, [1920] 1 K. B. 487; 89 L. J. K. B. 379; 122 L. T. 537. It is not necessary to prove that the master actually knew of any defect or danger; it is sufficient to prove that he ought to have known (*Baker* v. *James Brothers & Sons*, [1921] 2 K. B. 674; 90 L. J. K. B. 1190; 37 T. L. R. 591, reviewing the authorities and not following *Griffith* v. *London and St. Katharine's Docks Co.*, 13 Q. B. D. 259; 53 L. J. Q. B. 504; 51 L. T. 533).

(*d*) *Tarrant* v. *Webb* (*ubi supra*); *Ashworth* v. *Stanwix*, 3 E. & E. 701; 30 L. J. Q. B. 183; 4 L. T. 85; 122 R. R. 906.

(*e*) *Roberts* v. *Smith*, 2 H. & N. 213; 26 L. J. Ex. 319; 115 R. R. 499.

(*f*) *Young* v. *Hoffman Manufacturing Co.*, [1907] 2 K. B., at p. 656; 76 L. J. K. B. 993; 97 L. T. 230; 23 T. L. R. 671

injury caused to his servant by breach of any statutory duty imposed upon him for the protection of his servants (*g*).

Defences.—The master might avail himself of any defence which could be set up in an ordinary action of negligence, as, *e.g.*, that the injury was caused by the contributory negligence of the servant (*h*). If injury resulting in death was caused to the servant, the employer was, and, subject to *Lord Campbell's Act*, 1846 (*i*), still is, discharged by the rule that *Actio personalis moritur cum persona*.

Of the Common Law defences, probably the most important was that depending on the maxim *Volenti non fit injuria*—namely, that the servant was cognisant of the full extent of the danger, and voluntarily ran the risk (*k*). "The maxim . . . is not '*Scienti non fit injuria*,' but '*Volenti*'": there may be a perception of the existence of the danger without comprehension of the risk . . . ; there may, again, be concurrent facts which justify the enquiry whether the risk, though known, was encountered voluntarily" (*l*). Whether or not the servant was *volens* "is a question of fact to be decided on the circumstances of each case," and "in considering such a question the circumstance that the servant has entered into, or continued in, his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive, against him" (*m*).

Common Employment.—Upon the doctrine that a servant took on himself the ordinary risks incident to his employment, the case of *Priestley* v. *Fowler* (*n*), and a series of cases following it (*o*), engrafted the corollary that the negligence of a fellow-

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(*g*) *Groves* v. *Wimborne (Lord)*, [1898] 2 Q. B. 402; 67 L. J. Q. B. 862; 79 L. T. 284; *Butler* v. *Fife Coal Co.*, [1904] A. C. 149 (*ante*, p. 497).

(*h*) *Senior* v. *Ward*, 1 E. & E. 385; 28 L. J. Q. B. 139.

(*i*) *Ante*, p. 514.

(*k*) *Thomas* v. *Quartermaine*, 18 Q. B. D., at p. 695; 56 L. J. Q. B. 340.

(*l*) *Id.*, at p. 696. And "the doctrine of *Volenti non fit injuria* stands outside the defence of contributory negligence and is in no way limited by it." *Id.*, at p. 697; and see *ante*, p. 596.

(*m*) *Smith* v. *Baker & Sons*, [1891] A. C. 325; 60 L. J. Q. B. 683; *Williams* v. *Birmingham Battery, etc., Co.*, [1899] 2 Q. B., at p. 345; 68 L. J. Q. B. 918; 81 L. T. 62. But the servant's knowledge of the risk may be evidence of contributory negligence on his part (*Baker* v. *James Brothers & Sons*, 37 L. T., at p. 593; 90 L. J. K. B. 1190).

(*n*) 3 M. & W. 1; 7 L. J. Ex. 42; 49 R. R. 495.

(*o*) See, *e.g.*, *Hutchinson* v. *York, etc., Railway*, 5 Ex. 343; 19 L. J. Ex.

servant in the common employment of the master was one of such ordinary risks (*p*).

For the doctrine of common employment to apply, there must be—

(i) *A common employer.*—Thus, in the case of *Johnson* v. *Lindsay & Co.* (*q*), H. & Co. were contractors for building a block of houses in accordance with plans and specifications prepared by B., the owner's architect. The building contract provided that H. & Co. were to provide £215, to be paid to L. & Co. (the respondents) for fireproof flooring. The contract with the respondents for this flooring was made by B., and the respondents were under no obligation to receive any directions from H. & Co. The appellant, who was a workman in the service of H. & Co., being injured by the negligence of a servant employed by the respondents, it was held that, since the relationship of master and servant did not exist between them, the doctrine of common employment did not apply.

(ii) *A common employment.*—The employment must be common " in this sense—that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others " (*r*). But it is not necessary that the workman should be of the same grade or engaged in the same department or upon the same immediate object (*s*). Thus the captain of a vessel has been held to be in common employment with an ordinary seaman (*t*), and a carpenter employed by a railway company with porters who, in shifting an engine upon a turntable, negligently allowed it to project so far beyond the table that it struck the scaffold upon which the plaintiff was working, and threw him to the ground (*u*).

296; 82 R. R. 697; and *Bartonshill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas. 266, where the rule was finally settled by the House of Lords.

(*p*) *Thomas* v. *Quartermaine*, 18 Q. B. D., at pp. 691, 692.

(*q*) [1891] 3 A. C. 371; 61 L. J. Q. B. 90; 65 L. T. 97. See also *Swainson* v. *North Eastern Railway*, 3 Ex. D. 341; 56 L. J. Q. B. 310; 56 L. T. 335.

(*r*) *Morgan* v. *Vale of Neath Railway*, 5 B. & S., at p. 580; affirmed, L. R. 1 Q. B. 149; 33 L. J. Q. B. 260; approved in *The Petrel*, [1893] P., at p. 324; 62 L. J. P. 92; 70 L. T. 417.

(*s*) *Wilson* v. *Merry*, L. R. 1 H. L. (Sc.) 326; 19 L. T. 30.

(*t*) *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A. C. 222; 63 L. J. Q. B. 419; 70 L. T. 630.

(*u*) *Morgan* v. *Vale of Neath Railway* (*ubi supra*). See also *Burr* v. *Drury Lane Theatre*, [1907] 1 K. B. 544; 76 L. J. K. B. 459; 96 L. T. 447;

A person who, without the knowledge of the defendant, has volunteered to assist the defendant's servants in the performance of their work is, as regards the defendant, a mere trespasser, and "cannot claim a higher protection than that the master himself shall not wilfully or carelessly injure him: he cannot make the master liable for negligent acts of his servants" (*x*). But where "the injured person voluntarily assists the master's servant in a service in which he has a common interest with the master, and by the invitation or with the acquiescence of the master or his servant acting within the scope of his employment, [he] is not a mere volunteer, and can recover if he is injured by the negligence of the master's servants" (*y*).

The defence of common employment, although depending upon contract, may be set up against an infant workman (*z*). But it cannot be set up where there has been a breach by the employer of a statutory duty imposed upon him for the protection of the workman (*a*).

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23 T. L. R. 299 (chorus-girl and scene-shifter held to be in common employment).

(*x*) *Hayward* v. *Drury Lane Theatre and Moss' Empires, Ltd.*, [1917] 2 K. B., at p. 911; 87 L. J. K. B. 13; 117 L. T. 523; 33 T. L. R. 557.

(*y*) *Id.*, at p. 906. Here the defendants, Moss' Empires, Ltd., had the use of Drury Lane Theatre for the production of a revue. The plaintiff, at the request of the defendants, attended rehearsals without payment, with the object, on the part of the defendants, of testing her capacity, and, on her part, of obtaining an engagement. There was no present contractual relation between them. While attending a rehearsal she met with an accident through the negligence of a servant of these defendants, in respect of which she sued both defendants and obtained judgment against Moss' Empires, Ltd. *Held* (following *Holmes* v. *North Eastern Railway*, L. R. 6 Ex. 123; 40 L. J. Ex. 121, and *Wright* v. *London and North Western Railway*, 1 Q. B. D. 252; 45 L. J. Q. B. 570, and distinguishing *Degg* v. *Midland Railway*, 1 H. & N. 773; 26 L. J. Ex. 171; 108 R. R. 816, and *Potter* v. *Faulkner*, 1 B. & S. 800; 31 L. J. Q. B. 30; 124 R. R. 755) that the plaintiff was not a mere volunteer, but was, by the acquiescence of Moss' Empires, Ltd., assisting their servant in a service in which she had a common interest with them, and therefore the doctrine of common employment did not apply. Her exact position was that she was upon their premises as a licensee with an interest, who has the same rights as an invitee who does not pay for his presence (*Id.*, at pp. 913, 914; and see *ante*, p. 606).

(*z*) *Young* v. *Hoffman Manufacturing Co.* (*ante*, p. 617, n. (*f*)). But where an action is brought against an employer by a servant who has been injured through the negligence of the employer's foreman in not sufficiently instructing him, the sufficiency of the means adopted by the *employer* to fulfil his duty of instruction must depend upon the age and physical and mental capacity of the servant. (*Id.*)

(*a*) See cases cited *ante*, p. 618, n. (*g*), and *Jones* v. *Canadian Pacific Railway*, 83 L. J. P. C. 13; 110 L. T. 83.

2. **Under the Employers' Liability Act, 1880.**—This Act provides that where "personal injury is caused to a *workman* (*b*)—

"(1) By reason of any defect (*c*) in the condition of the ways (*d*), works (*e*), machinery (*f*), or plant (*g*)

(*b*) By s. 8, a workman is defined as "a railway servant and any person to whom the Employers and Workmen Act, 1875, applies." By s. 10 of the latter Act, "the expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner or otherwise engaged in *manual labour*, whether under the age of twenty-one or above that age, has entered into or works under a contract with an employer, whether the contract . . . be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour." Seamen are excluded by s. 13 of the Act of 1875. As to the words "or otherwise engaged in manual labour," it has been held that the manual labour must be of the same kind as that which is exercised in the specified employments (*Morgan* v. *London General Omnibus Co.*, 13 Q. B. D. 852; 53 L. J. Q. B. 352; 51 L. T. 213). Thus the Act has been held not to apply to an omnibus conductor (*id.*), nor to a tramcar driver (*Cook* v. *North Metropolitan Tramways*, 18 Q. B. D. 683; 56 L. J. Q. B. 309; 56 L. T. 448), nor to shop assistants, although manual labour may be incidental to their duties (*Bound* v. *Lawrence*, [1892] 1 Q. B. 226; 61 L. J. M. C. 137; 65 L. T. 844; *Hoare* v. *Green*, [1907] 2 K. B. 315; 76 L. J. K. B. 730; 96 L. T. 724; 23 T. L. R. 483). But it has been held to apply to a carman, whose duty was not only to drive, but to load and unload the goods which he carried (*Yarmouth* v. *France*, 19 Q. B. D. 647; 57 L. J. Q. B. 7), and to the driver of a motor omnibus who had to do road repairs to the omnibus and was provided with tools for the purpose (*Smith* v. *Associated Omnibus Co.*, [1907] 1 K. B. 916; 76 L. J. K. B. 574; 96 L. T. 675; 23 T. L. R. 38).

(*c*) As to what constitutes a defect, see *James Nimmo & Co.* v. *Connell*, [1924] A. C. 595; 93 L. J. P. C. 147; 131 L. T. 97; 40 T. L. R. 522, where the authorities on this point are reviewed. The word "defect" does not refer solely to a material defect in structure or substance, but to any condition of ways, works, etc., which renders them unfit for the uses for which they were designed, to which they were intended to be put and are in fact being put: thus, there is a defect in the condition of a way in a mine when it is filled with a dangerous accumulation of inflammable gas (*id.*). See also note (*f*), *infra*.

(*d*) A "way" need not be a defined path, but includes any course which a workman, in the course of his employment, would in ordinary circumstances take in order to go from one part of his employer's premises to another part (*Willetts* v. *Watts & Co.*, [1892] 2 Q. B. 92; 61 L. J. Q. B. 540; 66 L. T. 818; 8 T. L. R. 252).

(*e*) Buildings in course of construction for an employer, although intended to be connected with, or used in, his business, are not his works until used by him for his business (*Howe* v. *Mark Finch & Co.*, 17 Q. B. D. 187). But they are part of the works of the contractor who is constructing them (*Brannigan* v. *Robinson*, [1892] 1 Q. B. 344; 61 L. J. Q. B. 202; 66 L. T. 647; 8 T. L. R. 244).

(*f*) There may be a defect in the condition of machinery if, although sound in itself, it is unfit for the purpose for which it is used (*Heske* v. *Samuelson*, 12 Q. B. D. 30; 53 L. J. Q. B. 45; 49 L. T. 474; *Cripps* v. *Savage*, 13

(*g*) See note (*g*), p. 622.

connected with or used in the business of the employer (*h*); or

" (2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him (*i*) whilst in the exercise of such superintendence (*k*); or

" (3) By reason of the negligence of any person in the service of the employer to whose orders or directions (*l*) the workman at the time of the injury was bound to conform (*m*), and did conform, where such injury resulted from his having so conformed (*n*); or

" (4) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

" (5) By reason of the negligence of any person in the service of the employer who has the charge or con-

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Q. B. D. 582; 53 L. J. Q. B. 517; 51 L. T. 182; *Walsh* v. *Whiteley*, 21 Q. B. D. 378; 57 L. J. Q. B. 586) or if the system of using it is not reasonably fit for its purpose (*Smith* v. *Baker*, [1891] A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467).

(*g*) The term " plant " includes " whatever apparatus is used by a business man for carrying on his business . . . all goods and chattels fixed or movable, live or dead, which he keeps for permanent employment in his business " (*Yarmouth* v. *France*, 19 Q. B. D., at p. 658; 57 L. J. Q. B. 7), where a horse was held to be " plant " and its vicious nature a defect in its condition.

(*h*) The plant and machinery, etc., need not belong to the employer; it is sufficient if it is under his control and management (*Brannigan* v. *Robinson*, *ubi supra*; *Biddle* v. *Hart*, [1907] 1 K. B. 649; 76 L. J. K. B. 418; 23 T. L. R. 262).

(*i*) By s. 8, this means " a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labour."

(*k*) The negligence necessary to render the employer liable must be the negligent exercise of a duty of superintendence—*i.e.*, negligence in the capacity of superintendent and not in some other capacity (*Shaffers* v. *General Steam Navigation Co.*, 10 Q. B. D. 356; 52 L. J. Q. B. 260; 48 L. T. 228; *Osborne* v. *Jackson and Todd*, 11 Q. B. D. 619; 48 L. T. 642).

(*l*) Such orders, etc., may be implied (*Millward* v. *Midland Railway*, 14 Q. B. D. 68; 54 L. J. Q. B. 202; 52 L. T. 255).

(*m*) *I.e.*, not mere incidental directions given by one workman to another (*Howard* v. *Bennett*, 58 L. J. Q. B. 129; 60 L. T. 152; 5 T. L. R. 136).

(*n*) The orders need not be negligent; it is sufficient that the workman was bound to conform, and at the time of the injury was conforming, to the orders of the person whose negligence injured him (*Wild* v. *Waygood*, [1892] 1 Q. B. 782; 61 L. J. Q. B. 391; 65 L. T. 710; 8 T. L. R. 15).

trol (*o*) of any signal, points, locomotive engine, or train upon a railway (*p*);

"the workman, or, in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death (*q*), shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work."

By s. 2, a workman is not entitled under the Act to any right of compensation or remedy against the employer in the following cases:—

(1) Under s. 1 (1), unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition (*r*);

(2) Under s. 1 (4), unless the injury resulted from some impropriety or defect in the rules, by-laws, or instructions therein mentioned, provided that where a rule or by-law has been approved of or has been accepted as a proper rule or by-law by a principal Secretary of State, or by the Board of Trade, or any other department of the government under or by virtue of any Act of Parliament, it shall not be deemed an improper or defective rule or by-law;

(3) In any case where the workman knew of the defect or

(*o*) *I.e.*, who controls their working or movement (*Gibbs* v. *Great Western Railway*, 12 Q. B. D. 208; 53 L. J. Q. B. 543; 50 L. T. 7).

(*p*) This has been held to include a temporary railway laid down by a contractor for the purpose of the construction of works (*Doughty* v. *Firbank*, 10 Q. B. D. 358; 52 L. J. Q. B. 490; 48 L. T. 530); but a steam-crane fixed on a trolley, and propelled by steam along a set of rails when required to be moved, has been held not to be a locomotive engine within the above provisions (*Murphy* v. *Wilson*, 52 L. J. Q. B. 524; 48 L. T. 788).

(*q*) These words incorporate into the Act the provisions of Lord Campbell's Act (*ante*, p. 514). But the maxim *Actio personalis moritur cum persona* applies to actions under the Act, so that if an injured workman brings an action and dies before judgment the action abates, though a new action can be brought under Lord Campbell's Act; and, similarly, if the defendant dies before judgment, the cause of action dies also (*Gillett* v. *Fairbank*, 3 T. L. R. 618).

(*r*) See *Walsh* v. *Whiteley*, 21 Q. B. D. 371; 57 L. J. Q. B. 586.

negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of such defect or negligence.

The effect of the Act is to prevent the master from setting up the defence of common employment when sued by his workman under the provisions of the Act for any of the five matters specified in s. 1: with regard to those matters, however, the master has the same defence as if the action were brought against him by a stranger (*e.g.*, the defences of contributory negligence or *Volenti non fit injuria*), and he has also the special defences given by s. 2 of the Act (*s*).

By s. 3, the amount of compensation shall not *exceed* such sum as may be found to be equivalent to the estimated earnings (*t*), during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

By s. 6, every action for recovery of compensation under the Act must be brought in the County Court, but may, on the application of either the plaintiff or the defendant, be removed into the High Court.

By s. 4, an action for recovery of compensation under the Act is not maintainable unless *notice* (*u*) that an injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve

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(*s*) *Weblin* v. *Ballard*, 17 Q. B. D. 125; 55 L. J. Q. B. 395; 54 L. T. 532; *Thomas* v. *Quartermaine*, 18 Q. B. D. 685; 56 L. J. Q. B. 341; 57 L. T. 537; 3 T. L. R. 495.

(*t*) This includes not only money but any payment in kind which is capable of pecuniary valuation, such as food or clothing (*Noel* v. *Redruth Foundry Co.*, [1896] 1 Q. B. 453; 65 L. J. Q. B. 330; 74 L. T. 196), but it does not include anything incapable of such valuation, as, *e.g.*, tuition received by an apprentice (*id.*). The wages earned by a workman in working overtime for an employer other than the one in whose service he was injured may be taken into consideration, provided that the maximum of three years' wages is not exceeded (*Bortick* v. *Head, Wrightson & Co.*, 53 L. T. 909; 2 T. L. R. 103).

(*u*) Notice must be in writing (*Moyle* v. *Jenkins*, 8 Q. B. D. 116; 54 L. J. Q. B. 112; 46 L. T. 472).

months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the Judge shall be of opinion that there was reasonable excuse for such want of notice. By s. 7, the notice of injury must give the name and address of the person injured, and must state in ordinary language the cause of the injury and the date at which it was sustained and shall be served on the employer, or, if there is more than one employer, upon one of such employers. It may be served by delivery to, or at the residence or place of business of, the person on whom it is to be served, or by registered post. It is not to be deemed invalid by reason of any defect or inaccuracy therein, unless the Judge who tries the case is of opinion that the defendant in the action is prejudiced by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading. A workman may contract out of the Act (*x*), even though he is an infant, provided in the latter case that the contract, regarded as a whole, is for his benefit (*y*).

3. **Under the Workmen's Compensation Act, 1925.**—By this Act an employer is, with some limitations, made an insurer of his workmen against personal injury by accident arising out of and in the course of their employment, whether or not such injury was caused by any negligence or breach of duty on his part.

This Act consolidated the Workmen's Compensation Acts of 1906 and 1923, and all other existing statutory provisions relating to workmen's compensation. It came into operation on May 1, 1926 (*z*), and does not apply in any case where the accident happened before January 1, 1924, when the Act of 1923 came into force. The Act is in itself very complicated and there is a mass of decisions upon the corresponding sections of the earlier Acts. It is therefore impossible to give more than a bare outline of the chief provisions of the Act and of the principles laid down by some of the most important decisions.

Definitions.—By s. 3 of the Act the word "*workmen*"

(*x*) *Griffiths* v. *Earl Dudley*, 9 Q. B. D. 357; 51 L. J. Q. B. 543; 47 L. T. 10.
(*y*) *Clements* v. *London and North Western Railway*, [1894] 2 Q. B. 482.
(*z*) S. 50 (1).

means, subject to the exceptions hereinafter mentioned, "any person who has entered into or works under a *contract of service* (*a*) *or apprenticeship* with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing; and also includes a person engaged in plying for hire with any vehicle or vessel the use of which is obtained from the owner thereof under any contract of bailment other than a hire-purchase agreement."

But the following are excepted:—

"(a) any person employed otherwise than by way of manual labour whose remuneration exceeds £350 a year;

"(b) a person whose employment is of a casual nature *and* who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;

"(c) a member of a police force;

"(d) an out worker;

"(e) a member of the employer's family dwelling in his house."

The Act does not apply to persons in the naval or military or (subject to certain exceptions (*b*)) air service of the Crown, but otherwise applies to workmen employed by or under the Crown (*c*). It applies, subject to certain modifications, to persons employed on ships registered in the United Kingdom, or any other British ship of which the owner (or, if there is more than one owner, the managing-owner or manager) resides or has his place of business in the United Kingdom, provided that such persons are workmen within the meaning of the Act (*d*).

(*a*) The Act applies only where the relationship of master and servant exists. It does not therefore apply to a contract *for services* as distinct from a contract *of service*. Thus, "it would . . . be absurd to hold that a skilled music-master who gives lessons to a pupil, either in his own house or in the pupil's house, is to be regarded as the 'workman' and the pupil as the 'employer.' In such a case there may be a contract for services, but there is not a contract of service" (*Simmons* v. *Heath Laundry Co.*, [1910] 1 K. B., at p. 548; 79 L. J. K. B. 395; 102 L. T. 210; 26 T. L. R. 326).

(*b*) S. 36.

(*c*) S. 33.

(*d*) S. 35.

By s. 5, the expression "*employer*" includes any body of persons, corporate or incorporate, and the legal personal representatives of a deceased employer. Where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter is, for the purposes of the Act, deemed to continue to be the employer of the workman while he is working for that other person. Where a person is employed for the purposes of any game or recreation and engaged or paid through a club, the manager, or members of the managing committee of the club are, for the purposes of the Act, deemed to be the employer.

By s. 6 of the Act, it is further provided that where any person (in the section referred to as the principal) *in the course of or for the purpose of his trade or business*, contracts with any other person for the execution by or under the contractor of the whole or any part of any work *undertaken* by the principal (*e*), the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him, but the amount of the compensation will be calculated with reference to the earnings of the workman under the contractor. Where, however, the contract relates to agricultural work for the purpose of which the contractor provides and uses machinery driven by mechanical power, he alone is liable under the Act to pay compensation to any workman employed by

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(*e*) That is to say, work undertaken by the principal in the course of or for the purposes of the principal's trade or business. This includes both work undertaken by the principal for another person and work undertaken by him for himself, because he has adopted that particular kind of work as his trade or business, but it does not include work done merely to enable a trade or business to be carried on, as, *e.g.*, the repairing of a boiler for a cotton spinner in order to enable him to carry on his business (*Skates* v. *Jones & Co.*, [1910] 2 K. B. 903; 79 L. J. K. B. 1168; 103 L. T. 408; 26 T. L. R. 643). "A builder or decorator may be said to undertake the work of building or decorating a house whether he does it for himself or another; but a banker or a grocer neither builds nor decorates as part of his trade or business, and no one would say that either of them had undertaken the building or decorating; it is the builder or decorator employed by him who undertakes the work" ([1910] 2 K. B., at pp. 909, 910). By s. 48 (2) of the Act the exercise and performance of the powers and duties of a local or other public authority are for the purposes of the Act to be treated as the trade or business of the authority.

him on such work. Where the principal is liable to pay compensation under this section, he is entitled to be indemnified by any one who would have been liable independently of the section. Nothing in this section is, however, to prevent a workman from recovering compensation from the contractor instead of the principal. This section does not, moreover, apply where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

When compensation is payable.—By s. 1 of the Act it is provided that—

1. If in any employment " personal injury by *accident arising out of and in the course of the employment* is caused to a workman " his employer shall be liable to pay compensation in accordance with the provisions of the Act:

Provided that—

(a) The employer shall not be liable under the Act in respect of any injury which does not disable the workman for a period of at least three days from earning full wages at the work at which he was employed:

(b) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.

2. For the purposes of the Act an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was, at the time when the accident happened, acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, *if such act was done by the workman for the purposes of and in connection with his employer's trade or business.*

3. This Act shall apply *notwithstanding any contract to the contrary*, whether made before or after the commencement of the Act, except that where under this Act the provisions of a

scheme are substituted for the provisions of this Act, the employer shall be liable only in accordance with the scheme " (*f*).

In order to bring himself within this section the workman must accordingly show (1) that he has suffered personal injury by accident, and (2) that the accident arose out of and in the course of his employment.

As to the first point, it must be noticed that the language of the Act is not " an accident," but " accident " (*g*), the expression " injury by accident " includes therefore " any unexpected personal injury resulting to the workman . . . from any unlooked for mishap or occurrence " (*h*), whether it is caused by *an* accident or is an unexpected result of the work itself, such as a rupture caused by a strain (*i*), or disease arising from accidental circumstances, as, *e.g.*, the contraction of anthrax by a wool sorter (*k*), or blood poisoning caused to a workman owing to an abrasion in his leg being infected by bacilli present in bone dust which he was handling (*l*). But a disease which is gradually contracted as a natural result of a particular employment is not within the Act unless it falls within the provisions of Part II., which applies only to certain industrial diseases.

As to the second point, the term " employment " means " the work which the man is employed to do and what is incident to it " (*m*).

(*f*) As to such certified schemes, see *post*, p. 616.

(*g*) *Warner* v. *Couchman*, [1912] A. C., at p. 38; 81 L. J. K. B. 45; 105 L. T. 676; 28 T. L. R. 58.

(*h*) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A. C., at p. 451; 72 L. J. K. B. 787; 89 L. T. 314; 19 T. L. R. 684. The expression " unexpected " means unexpected by the workman, the term " accident " may include, therefore, a premeditated injury inflicted on the workman, see *Trim Joint District School* v. *Kelly*, [1914] A. C. 667; 83 L. J. P. C. 220; 111 L. T. 305; 30 T. L. R. 452, where a teacher in an industrial school suffered fatal injuries as a result of a concerted attack upon him by the boys in the school, and it was held that the occurrence was an accident. See also *Nisbet* v. *Rayne and Burn*, [1910] 2 K. B. 689; 80 L. J. K. B. 84; 103 L. T. 178; 26 T. L. R. 632, where a cashier while taking money from his employer's office to a colliery to pay the men was robbed and murdered, and it was held that he met his death by accident. (*i*) *Fenton* v. *Thorley* (*ubi supra*).

(*k*) *Brinton's, Ltd.* v. *Turvey*, [1905] A. C. 230; 74 L. J. K. B. 474; 92 L. T. 578; 21 T. L. R. 444.

(*l*) *Innes* v. *Kynoch*, [1919] A. C. 765; 88 L. J. P. C. 85; 121 L. T. 39; 35 T. L. R. 392.

(*m*) *Davidson* v. *McRobb*, [1918] A. C., at p. 314; 87 L. J. P. C. 58; 118 L. T. 451; 34 T. L. R. 213; *St. Helens Colliery* v. *Hewitson*, [1924] A. C., at p. 74; 93 L. J. K. B. 177; 130 L. T. 291; 40 T. L. R. 125.

The first essential is that the accident should have happened "*in the course of the employment*," that is to say, it must have occurred *during* the employment of the workman, *and* while he was doing something that his employer could and did, expressly or by implication, employ him to do or order him to do (*n*). The expression "in the course of the employment" does not, on the one hand, mean merely during the currency of the time of the engagement, thus, for example, the service of a domestic servant who sleeps and takes his meals in his master's house is interrupted if he goes out on his own business or pleasure (*o*). On the other hand, the term "employment" is not confined to the actual work which the man is employed to do, it may begin before he has actually commenced his work, and may continue after the termination of his work, as, for example, if, by virtue of his contract of service, he is under an *obligation* or *necessity* to use a particular means of transit to or from his work (*p*); so also the employment of a workman may continue during a legitimate interruption as, *e.g.*, when he is taking a meal or "merely standing by, waiting for the next job" (*q*).

The second essential is that the accident should arise "*out of the employment*." As to this a frequently cited test is—"Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury" (*r*). If the workman was in fact doing that which he was employed to do he is not debarred from compensation merely because he was doing it imprudently or disobediently unless (except where it results in death or serious and permanent disablement) his injury is attributable to serious and wilful misconduct (*s*). But there is a difference between imprudence and disobedience in the *mode* of doing work which the man is employed to do, and imprudence or disobedience which

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(*n*) [1924] A. C., at pp. 91, 92.

(*o*) [1918] A. C., at pp. 314, 315, 321.

(*p*) *St. Helens Colliery* v. *Hewitson* (*ubi supra*). It is not sufficient that he has a mere right or privilege to use that means of transit (*id.*).

(*q*) *Id.*, [1924] A. C., at p. 91.

(*r*) *Lancashire and Yorkshire Railway Co.* v. *Highley*, [1917] A. C., at p. 372; 86 L. J. K. B. 715; 116 L. T. 767; 33 T. L. R. 286.

(*s*) *Barnes* v. *Nunnery Colliery Co., Ltd.*, [1912] A. C., at pp. 47, 49; 81 L. J. K. B. 213; 105 L. T. 961; 28 T. L. R. 135; *Upton* v. *Great Central Railway Co.*, [1924] A. C., at p. 306; 93 L. J. K. B. 224; 130 L. T. 577; 40 T. L. R. 204.

carries a man outside the *sphere* of his employment (*t*). And if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do *or* is put outside the range of his service by a genuine prohibition, then any risk which he incurs by doing it is not a risk of the employment but an " added peril " voluntarily superinduced by the workman on the risks arising out of the employment (*u*). Thus, an accident does not arise out of the employment if it is due to a risk caused by the workman in exceeding the implied limitations of his authority by arrogating to himself duties which he was not employed to perform (*x*), or in going to forbidden territory (*y*), or in disobeying a prohibition which limits the sphere of his employment (unless such disobedience is habitually winked at by the employer (*z*)), or in deviating from his duty for his own pleasure or purposes (*a*), or in doing an act in so unreasonable or negligent a way as to turn it into a different act from that which he was employed to do (*b*).

Assuming, however, that the workman was acting in the sphere of his employment, an accident arises out of that employment if it results from some special danger due to the nature, conditions, obligations or incidents of his service (*c*). The

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(*t*) *Barnes* v. *Nunnery Colliery Co., Ltd.* (*ubi supra*).

(*u*) [1912] A. C., at p. 47; *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A. C., at p. 67; 83 L. J. K. B. 197; 109 L. T. 759; 30 T. L. R. 174; *Lancashire, etc., Railway* v. *Highley* (*ubi supra*), [1917] A. C., at pp. 361, 371, 372; *Wilson's, etc., Coal Co.* v. *M'Ferrin*, [1926] A. C., at p. 387; 95 L. J. P. C. 130; 135 L. T. 164; 42 T. L. R. 397. But an act which, in an emergency, is done by a workman in the interests of his employer, may be within the sphere of his employment although it was not an act which in ordinary circumstances he would be required or expected to do, see *Jones* v. *Tarr*, [1926] 1 K. B., at p. 31; 95 L. J. K. B. 203; 133 L. T. 783; 41 T. L. R. 642. (*x*) *Wilson's, etc., Coal Co.* v. *M'Ferrin* (*ubi supra*).

(*y*) See *Plumb* v. *Cobden Flour Mills Co., Ltd.* (*ubi supra*), [1914] A. C., at p. 66; *Herbert* v. *Samuel Fox & Co., Ltd.*, [1916] 1 A. C., at p. 420; 85 L. J. K. B. 441; 114 L. T. 426; 32 T. L. R. 261; *Davies* v. *Gwauncaegurwen Colliery*, [1924] 2 K. B., at p. 663; 94 L. J. K. B. 229; 132 L. T. 221; 40 T. L. R. 859.

(*z*) [1912] A. C., at p. 51; see also *Lancashire, etc., Railway Co.* v. *Highley* (*ubi supra*).

(*a*) *Smith* v. *Lancashire and Yorkshire Railway*, [1899] 1 Q. B. 145; 68 L. J. Q. B. 51; 79 L. T. 633; 15 T. L. R. 64; *Reed* v. *Great Western Railway*, [1909] A. C. 31; 78 L. J. K. B. 31; 99 L. T. 781; 25 T. L. R. 36.

(*b*) *Lancashire etc., Railway Co.* v. *Highley* (*ubi supra*); *Guest* v. *Gaston & Co.*, [1927] 1 K. B., at pp. 12, 13.

(*c*) *Thom* v. *Sinclair*, [1917] A. C., at p. 142; 86 L. J. P. C. 102; 116 L. T. 609; 33 T. L. R. 247.

expression " arising out of " imports some kind of causal relation with the employment, but it does not logically necessitate direct or physical causation, it is sufficient if there has been injury by accident arising out of what the workman had to do, merely because of the conditions of his employment (*d*). And, if the risk is one which arises out of the employment, it is immaterial that the same risk is shared by other members of the public who are not so employed; thus, if in the course of his employment a workman is required to incur the dangers of the streets, those dangers are risks of his employment, although shared by all members of the public (*e*). But a risk arising from natural causes such as severe weather or lightning is not a risk of the employment unless the character of the employment intensifies the risk and makes it greater than the ordinary normal risk to which other persons in the neighbourhood, not similarly employed, are exposed (*f*).

There remain, however, to be considered, the provisions of sub-s. (2) of this section (*g*). These provisions first appeared in the Act of 1923, and their meaning is not yet altogether clear. Their general effect, however, appears to be as follows:—

They do not affect the requirement of sub-s. (1) that the accident should arise out of and in the course of the employment (*h*). They do not accordingly apply where a workman has arrogated to himself duties which he was neither engaged nor entitled to perform (*i*), nor where a workman is not acting in the course of his employment at all (*k*).

(*d*) *Upton* v. *Great Central Railway Co.*, [1924] A. C., at pp. 306, 307; 93 L. J. K. B. 224; 130 L. T. 577; 40 T. L. R. 204. In this case a workman in the employment of a railway company was directed to travel by train from A station to B station to do certain work near B station. After finishing his work he returned to B station in order to take the train back to A station. When the train came in he hurried across the platform to reach the proper carriage and slipped and injured his knee. *Held*, that the accident arose out of his employment.

(*e*) *Dennis* v. *White*, [1917] A. C. 479; 86 L. J. K. B. 1074; 116 L. T. 774; 33 T. L. R. 434.

(*f*) *Andrew* v. *Failsworth Industrial, etc., Society*, [1904] 2 K. B. 32; 73 L. J. K. B. 511; 90 L. T. 611; 20 T. L. R. 429; *Warner* v. *Couchman*, [1912] A. C. 35; 81 L. J. K. B. 45; 105 L. T. 676; 28 T. L. R. 58; *Upton* v. *Great Central Railway Co.* (*ubi supra*), [1924] A. C., at p. 307.

(*g*) *Ante*, p. 628.

(*h*) *Wilson's, etc., Coal Co.* v. *M'Ferrin*, [1926] A. C. 377; 95 L. J. P. C. 130; 135 L. T. 164; 42 T. L. R. 397.

(*i*) *Id.*

(*k*) *Borley* v. *Ockenden*, [1925] 2 K. B. 325; 133 L. T. 72; 41 T. L. R.

They do not apply unless the act was done by the workman both " for the purposes of *and* in connection with his employer's trade or business " (*l*).

They apply only where the accident results in the death or serious and permanent disablement of the workman (*m*).

If, however, these conditions are satisfied they preclude the employer from raising the three defences that the workman was at the time when the accident happened acting (i) in contravention of any statutory or other regulation applicable to his employment, or (ii) in contravention of any orders given by or on behalf of his employer, or (iii) without any instructions from his employer; but, if independently of any such prohibition or order or absence of instructions, the act would be outside the employment, then these provisions have no application to it (*n*).

Persons entitled to compensation.—The compensation is payable to or for the benefit of the workman, or, where death results from the injury, to his dependants (*o*).

The term *dependants* includes such members of the workman's family as were wholly or in part dependent upon his earnings at the time of his death or would, but for the incapacity due to the accident, have been so dependent (*p*). No one, however, is to be deemed a partial dependant unless he was dependent partially on

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314. Here a finisher of boots took home, in disobedience to orders, a customer's pair of boots in order to repair them, his motive being to learn to repair and so increase his earning capacity. *Held*, that these provisions could not apply because " he was doing something which he was not employed to do, at a place where he was not employed, and at a time when he was not under the orders of his employer " ([1925] 2 K. B., at p. 335).

(*l*) See *Davies* v. *Gwauncaegurwen Colliery*, [1924] 2 K. B. 651; 94 L. J. K. B. 229; 132 L. T. 221; 40 T. L. R. 859; *Garrallan Coal Co.* v. *Anderson*, [1927] A. C. 59.

(*m*) *Ante*, p. 628.

(*n*) *Jones* v. *Tarr*, [1926] 1 K. B. 25; 95 L. J. K. B. 203; 133 L. T. 783; 41 T. L. R. 642; *Guest* v. *Gaston & Co.*, [1927] 1 K. B. 1.

(*o*) S. 2 (1). Where a dependant dies before a claim is made, or, if a claim is made, before an agreement or award has been arrived at or made, the legal personal representatives of such dependant have no right to compensation (s. 2 (3)).

(*p*) S. 4 (1); the expression "members of the workman's family" means wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, granddaughter, stepson, stepdaughter, brother, sister, half-brother, half-sister; where the workman is the parent or grandparent of an illegitimate child, or, being an illegitimate child, leaves a parent or grandparent, such child, parent or grandparent may be a dependant (s. 4 (1) (3)).

contributions from the workman for the provision of the ordinary necessaries of life suitable for persons in his class and position (*q*).

Amount of compensation.—The rules for ascertaining the amount of compensation are contained in ss. 8—10 of the Act, and are very complicated. Their general effect is as follows:—

1. *Where death results from the injury* (*r*) the compensation is a lump sum to which in certain cases may be added a "children's allowance." If the workman leaves any persons wholly dependent on his earnings, the lump sum is a sum equal to his earnings in the employment of the same employer (*s*), for the three years preceding the injury, or £200, whichever is the larger, but in no case more than £300. If he has not been in the employment for three years the amount of his earnings will be deemed to be 156 times his average weekly earnings during his actual employment under the employer.

If he leaves only persons partially dependent upon his earnings, the lump sum is such sum, not exceeding the foregoing amount, as is reasonable and proportionate to the injury to such dependants.

If he leaves no dependants, the lump sum is an amount equal to the reasonable expenses of his medical attendance and burial, not exceeding £15.

The children's allowance is payable only when the workman leaves a widow or other member of his family (not being a child under fifteen) wholly or partially dependent on his earnings, and also leaves one or more children under the age of fifteen so dependent. In this case an amount calculated in the method prescribed by the Act, and varying according as the widow or other member of the workman's family and such child or children were wholly or partially dependent on the workman's earnings, is payable in respect of each child under fifteen (*t*).

(*q*) S. 4 (2).

(*r*) S. 8.

(*s*) The expression "employment by the same employer" means "employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause" (s. 10 (iii)).

(*t*) The *maximum* payable to a child is 15 per cent. of the amount obtained by multiplying the average weekly earnings of the workman (or where such earnings exceed £2, by multiplying £2) by the number of weeks between his death and the date when the child will attain the age of fifteen.

The lump sum and children's allowance cannot, however, in the aggregate exceed £600 (*u*).

2. *Where total or partial incapacity for work results from the injury* (*x*), the compensation is a weekly sum payable during the incapacity, but in no case exceeding 30s.; in fixing the amount regard must be had to any payment, allowance, or benefit received by the workman from the employer during incapacity, and, if the incapacity lasts less than four weeks, no compensation is payable in respect of the first three days. Subject to these rules:—

(a) In case of *total incapacity* the weekly payment is a sum not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months, if he has been so long employed by the same employer, but, if not, then for any less period during which he has been in the employment of the same employer. If, however, the maximum weekly payment so calculated is less than 25s., the workman is also entitled, during total incapacity, to a weekly addition equal to half the difference between such maximum weekly payment and the sum of 25s. or his average weekly earnings, whichever is the less.

(b) In case of *partial incapacity*—

(i) If the maximum weekly payment in the case of total incapacity would have been 25s. or more, the weekly payment is half the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or able to earn in some suitable employment or business after the accident.

(ii) If the maximum weekly payment in the case of total incapacity would, with the weekly addition, if any, have amounted to less than 25s., the weekly payment is a sum bearing the same proportion to the said difference as such maximum weekly payment with such addition,

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(*u*) The compensation payable in case of death must, unless otherwise ordered, be paid into the county court, but, if so agreed, it may, if the workman leaves no dependants, be paid to his legal personal representative, or, if he have none, to the person to whom the expenses of medical attendance and burial are due (s. 26 (1)).

(*x*) S. 9.

if any, bears to the amount of the average weekly earnings of the workman before the accident (*y*).

If a workman who has so far recovered from injury as to be fit for employment of a certain kind (*z*) proves to the satisfaction of the Judge of the County Court that he has taken all reasonable steps to obtain, and has failed to obtain such employment, and that his failure is a consequence, wholly or mainly, of the injury, the Judge shall order that his incapacity shall continue to be treated as total incapacity for such time and subject to such conditions as may be provided by the order, without prejudice, however, to the right of review given by the Act: but every such order must be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit.

Declaration of liability.—If the workman is not suffering any pecuniary loss because no incapacity has yet arisen, he may, nevertheless, if there is a reasonable probability of incapacity arising in the future, obtain an award declaring that he has received injury by accident arising out of and in the course of his employment, but otherwise adjourning the arbitration, with liberty to either of the parties to make any subsequent application therein (*a*).

Rules for determining earnings (*b*).—The average weekly earnings must be computed "in such manner as is best calculated to give the rate per week at which the workman was being remunerated": Provided that where, by reason of the shortness of the time during which he has been in the employment of the employer, or the casual nature or terms of the employment, it is impossible to compute the rate of remuneration, regard may be had to the average weekly amount which during the twelve months before the accident was being earned by a person in the same grade employed at the same work by the same employer (*c*);

(*y*) That is to say, if the average pre-accident earnings were 46s., and the average *post*-accident earnings are 26s., and the maximum weekly payment with addition, if any, is 24s., the compensation be 24-46ths of (46 – 26) shillings = 10s. 5.2d. (See Willis's Workmen's Compensation, p. 187).

(*z*) *I.e.*, "Some line of labour which is known in the widest sense of the word to what might be called the labour market" (*Clarke* v. *United Steel Companies, Ltd.*, 18 B. W. C. C., at p. 531).

(*a*) See *King* v. *Port of London Authority*, [1920] A. C. 1; 85 L. J. K. B. 889; 121 L. T. 587; 35 T. L. R. 622, where the proper form of order in such cases was settled. (*b*) S. 10. (*c*) See *ante*, p. 634, n. (*s*).

or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

Where the workman had entered into concurrent contracts of service (*d*) with two or more employers under which he worked at one time for one such employer and at another time for another, his average weekly earnings must be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

Sums which the employer has been accustomed to pay to the workman to cover special expenses entailed by the nature of the employment must not be reckoned as part of the earnings (*e*).

Reviews of weekly payments.—Any weekly payment (*f*) may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or (subject to the statutory maximum) increased (*g*).

A weekly payment can be reviewed only when there has been a change of circumstances since the date of the agreement or award under which it is being made, or if further events have put a different complexion on the case as, *e.g.*, where the workman becomes unable, on account of his injury, to obtain any employment (*h*), or subsequent events show that the difficulty of finding suitable work is greater than had been supposed (*i*). When, on

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(*d*) Earnings from contracts which are not contracts "of service" must not, however, be considered (*Simmons* v. *Heath Laundry Co.*, *ante*, p. 626).

(*e*) Earnings may include tips or gratuities where the giving and taking of such tips is open and notorious and sanctioned by the employer, provided that such tips or gratuities (i) are not illicit, (ii) do not involve or encourage a neglect or breach of duty on the part of the workman to his employer, and (iii) are not sporadic and trivial in amount (*Great Western Railway* v. *Helps*, [1918] A. C., at p. 145; 87 L. J. K. B. 230; 118 L. T. 235; 34 T. L. R. 118).

(*f*) That is to say, any weekly payment which represents the full compensation payable under the Act (*Clawley* v. *Carlton Main Colliery Co.*, [1918] A. C. 744; 87 L. J. K. B. 920; 119 L. T. 715; 34 T. L. R. 577).

(*g*) S. 11. Special provisions are made by this section, as amended by s. 1 of the Workmen's Compensation Act, 1926, (i) for increasing the weekly payment when the application to review is made before or within six months after the workman attains twenty-one; (ii) for increasing or decreasing the weekly payment where there has been a fluctuation of more than 20 per cent. in the rate of remuneration in the class of employment in which the workman was engaged at the time of the accident.

(*h*) *Macdonald* v. *Wilson's, etc., Coal Co.*, [1912] A. C. 513; 81 L. J. P. C. 188; 28 T. L. R. 431.

(*i*) *McAlinden* v. *James Nimmo & Co., Ltd.*, [1920] A. C. 39; 88 L. J. P. C. 131; 121 L. T. 585.

an application to review, the weekly payment is ended, a declaration of liability may be made (*k*).

Power of employer to end or diminish weekly payments (*l*).—An employer may not, otherwise than in pursuance of an agreement or arbitration, end or diminish a weekly payment except in the following cases:—

(1) Where a workman in receipt of a weekly payment in respect of total incapacity has returned to work:

(2) Where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased:

(3) Where a medical practitioner who has examined the workman under s. 18 of the Act has certified that the workman has wholly or partially recovered, or that his incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which must set out the grounds of the medical practitioner's opinion) together with notice of the intention of the employer at the end of ten clear days from service of the notice to end the weekly payment, or to diminish it by the amount stated in the notice, has been served upon the workman.

In this case, however, if, before the expiration of the ten days, the workman sends to the employer a similar report, disagreeing with that sent by the employer, the weekly payment cannot be ended or diminished except in accordance with such report, or if the employer disputes it, in accordance with the certificate given by the medical referee under s. 19 of the Act (*m*).

Redemption of weekly payments (*n*).—Where any weekly payment has been continued for not less than six months, it may, on application by the employer, be redeemed by the payment of a

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(*k*) *King* v. *Port of London Authority* (*ubi supra*).

(*l*) The section applies not only to weekly payments made under an award or a recorded agreement, but to weekly payments made voluntarily or under an unrecorded agreement (*Pudney* v. *France, Fenwick & Co., Ltd.*, [1925] 1 K. B. 346; 94 L. J. K. B. 513; 132 L. T. 430; 41 T. L. R. 83.

(*m*) As to this section, see *post*, p. 641. The workman is not *obliged* to send a counter report but may proceed to arbitration (*Pudney* v. *France, Fenwick & Co., Ltd., ubi supra*).

(*n*) S. 13.

lump sum of such an amount as, where the incapacity is permanent, will purchase through the Post Office Savings Bank an annuity equal to 75 per cent. of the annual weekly payment, and as, in any other case, may be settled by arbitration (*o*). Nothing in this section, however, prevents an agreement being made for the redemption of a weekly payment by a lump sum.

Protection of compensation.—By s. 40 of the Act it is provided that a weekly payment payable under the Act or any scheme certified under the Act, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against it.

By s. 7 of the Act provisions are made for the protection of the workman in case the employer becomes bankrupt or makes a composition or arrangement with his creditors, or (if a company) in case it commences to be wound up (*p*), or a receiver or manager of its business is appointed, or possession is taken by debenture-holders secured by a floating charge of any property subject to the charge.

In such cases—

(1) If the employer is insured his rights against the insurers will pass to the workman, and if the employer is not fully covered by insurance the workman may prove for the balance in the bankruptcy or liquidation, or may recover the balance from the receiver or manager.

(2) If the employer is not insured, the amount due in respect of any compensation or liability for compensation accrued before the date of the receiving order, or the commencement of the winding-up or the date of the appointment of the receiver or of possession being taken, will be included among the preferred debts which, under s. 33 of the Bankruptcy Act, 1914, and s. 209 of the Companies (Consolidation) Act, 1908, are, in bankruptcy and winding-up, to be paid in priority to all other debts

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(*o*) Special provisions are, however, made by this section as to the amount of the lump sum in the case of an infant.

(*p*) Unless it is wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company (s. 40 (6)).

and which, under s. 107 of the Companies (Consolidation) Act, 1908, are to be paid before any claim for principal or interest in respect of debentures.

Where the compensation is a weekly payment, the amount due will be taken to be the amount of the lump sum for which it could be redeemed by the employer by the Act (*q*).

Conditions upon which compensation is payable.—These are contained in ss. 14—20 of the Act; the following are the most important:—

Notice of the accident (*r*).—Proceedings for the recovery of compensation under the Act are not maintainable unless *notice of the accident* has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the *claim for compensation* with respect to such accident has been made within six months from the occurrence of the accident or, in case of death, within six months from the death: Provided that—

(a) the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if the employer is proved to have had knowledge of the accident from any other source at or about the time of the accident, or if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence, or that such want, defect or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause; and

(b) the failure to make a claim within the period specified shall not be a bar to the maintenance of proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

Notice in respect of an injury may be given either in writing or orally to the employer (or, if there is more than one, to one of

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(*q*) As to protection in case of distress, see *ante*, p. 476.
(*r*) S. 14.

them) or to any foreman or other official under whose supervision the workman is employed, and must give the name and address of the person injured, and must state in ordinary language the cause of the injury and the date of the accident. If the notice is in writing it may be given by being delivered at, or sent by registered letter addressed to, the residence or place of business of the employer, or, where the employer is a body of persons, by being delivered, or sent by registered letter addressed to the employer, at the office or one of the offices of such body (*s*).

Medical inspection.—Where a workman has given notice of an accident (or where an accident has occurred in respect of which notice is necessary) and where a workman is receiving weekly payments under the Act, he must, if required by the employer, and, subject to regulations made under the Act, submit himself for examination to a medical practitioner provided and paid by the employer, and if he refuses to do so, or in any way obstructs the examination, his rights to take any proceedings or to receive the weekly payments will be suspended until the examination has taken place.

The Act also contains provisions under which the question of the condition of the workman and his fitness for employment, and also the question as to whether or to what extent his incapacity is due to the accident, may be referred to a medical referee whose certificate will be conclusive evidence of the matters certified; if the workman refuses to submit himself for examination by the medical referee or in any way obstructs the same, his rights will be suspended until it has taken place (*t*).

Residence in the United Kingdom.—If a workman receiving a weekly payment ceases to reside in the United Kingdom, the Channel Islands, or the Isle of Man, he will cease to be entitled

(*s*) Special provisions apply to mines, quarries, factories and workshops at which a summary, in prescribed form, of the requirements of the Act as to the giving of notice and making of claims, must be posted up in a conspicuous place, and also, a book in prescribed form must be kept in which particulars of an accident may be entered by an injured workman or some one on his behalf. And the want of, or any defect or inaccuracy in the notice of an accident will not be a bar to the maintenance of proceedings: (i) if such summary has not been posted up; (ii) if the accident has been reported by the employer to an inspector of mines or factories; (iii) if the accident has been registered in a register of accidents kept by the employer; (iv) if the injury has been treated in an ambulance room at the mine, quarry, factory or workshop (s. 15).

(*t*) Ss. 17—19.

to receive any weekly payment, unless the medical referee certifies that the incapacity is likely to be of a permanent nature; in this case he is entitled, on complying with certain regulations, to receive quarterly the amount of the weekly payments (*u*).

Procedure for determining compensation or settling questions.—By s. 21 it is provided that "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies) or as to the amount or duration of compensation under this Act, or, except as otherwise expressly provided, to the right to or amount of any indemnity under this Act, the question, if not settled by agreement, shall, subject to the provisions of this Act, be settled by the arbitration of a representative committee, or of an arbitrator or of a judge of county courts in accordance with the First Schedule to this Act."

"Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act, or, if not so settled before payment into court under this Act (*x*), shall be settled by the county court, and the amount payable to each dependant shall be settled by arbitration under this Act, or, if not so settled before payment into court under this Act, by the county court."

Agreements between employers and injured workmen.—No agreement can deprive a workman of his rights under the Act (*y*). He has the right to an unqualified agreement, which can be recorded and enforced as a judgment, to pay him the compensation to which he is entitled under the Act and, if he cannot obtain such an agreement, he may commence arbitration proceedings. The agreement must be an agreement to pay the compensation provided for by the Act and accordingly, except as permitted by the Act, the workman cannot agree to settle his claims for weekly compensation by the payment of a lump sum (*z*). But—

1. Where weekly payments are being made they may,

(*u*) S. 16.
(*x*) See *ante*, p. 635.
(*y*) S. 1 (3), *ante*, p. 628.
(*z*) *Russell* v. *Rudd*, [1923] A. C. 309; 92 L. J. K. B. 429; 129 L. T. 193; 39 T. L. R. 329.

subject to the approval of the county court, be redeemed by payment of a lump sum (*a*).

2. Where the employer disputes liability, a *composition agreement* may, *subject to the approval of the county court*, be made, whereby in consideration of the payment of a lump sum, the claim for compensation is precluded (*b*).

Arbitration (*c*).—Failing agreement any question arising under the Act must be determined by arbitration before either—

(i) A committee representative of an employer and his workmen (*d*).

(ii) A single arbitrator agreed on between the parties:

(iii) A County Court Judge (*e*):

(iv) A single arbitrator appointed by the County Court Judge.

As a general rule an arbitration under the Act is before the County Court Judge, from whom an appeal, on a question of *law* only lies to the Court of Appeal and thence to the House of Lords (*f*).

The procedure at arbitrations is regulated by Rules of Court. The Arbitration Act, 1889, does not apply to any arbitration under the Act, but a committee or an arbitrator may submit any question of law for the decision of the County Court Judge, whose decision is final unless either party appeals to the Court of Appeal (*g*).

Registration.—Where the amount of compensation has been ascertained or any weekly payment varied, or any other matter has been decided under the Act, either by agreement or by a

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(*a*) S. 13, *ante*, p. 638, and as to obtaining the approval of the County Court, see *post*, p. 644.

(*b*) S. 24.

(*c*) S. 21; Schedule 1.

(*d*) By s. 28 of the Act all or any of the powers conferred by the Act on County Courts or Judges of County Courts may, by order of the Secretary of State, be conferred on any committee representative of an employer and his workmen.

(*e*) By s. 27 of the Act it is provided that where any matter is to be done in a County Court or by or before the Judge or Registrar of a County Court, the same shall be done in, or by or before the Judge or Registrar of, the County Court of the district in which all the parties concerned reside, or, if they reside in different districts, the district prescribed by rules of Court.

(*f*) Schedule 1 (4).

(*g*) *Ibid.*

committee or arbitrator, a memorandum thereof shall be sent by the committee or arbitrator or any party interested to the Registrar of the County Court, who, on being satisfied as to its genuineness, must, subject to the provisions of the Act, record it in a special register, whereupon it will, for all purposes, be enforceable as a County Court judgment. Where, however, a workman seeks to record a memorandum and the employer objects on the ground that the workman has in fact returned to work and is earning the same wages as before the accident, the memorandum can only be recorded, if at all, upon such terms as the *Judge* of the County Court may think just (*h*).

Where a memorandum of an agreement for the payment of a *lump sum or a composition agreement* is sent for registration, the Registrar, or the County Court Judge, if in pursuance of the Act the matter is referred to him, (i) may require either party to furnish him with such information as he may consider necessary, or to appear before him, and (ii) may require a report as to the workman's condition to be obtained from a medical referee; if either of the parties fail to comply with any such requirement of the Registrar he may refuse to record the memorandum and refer the matter to the Judge; if it appears from the report of a medical referee that the prospects of the workman's recovery from incapacity cannot yet be approximately determined, the Registrar, or on appeal the Judge, may refuse to record the memorandum (*i*).

Invalidity of certain agreements unless registered (*k*).—

(1) An agreement as to the *redemption of weekly payments by a lump sum*, if not registered in accordance with the Act, will not, nor will the payment of the sum payable under the agreement, exempt a person by whom the weekly payment is payable from liability to continue to make that payment unless he proves that the failure to

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(*h*) S. 23 (1). If any objection is made to the genuineness of the memorandum as, *e.g.*, on the ground that no such agreement has been entered into, or that the terms of the agreement are not correctly stated, or that it was entered into under a mistake, or was obtained by fraud or undue influence, it cannot be recorded except with the consent in writing of the party disputing the genuineness or by order of the Judge (Workmen's Compensation Rules, 1926 (47) (48) (49)).

(*i*) S. 23 (3) (4); s. 24.

(*k*) S. 25.

register was not due to any neglect or default on his part.

(2) An agreement as to the amount of compensation to be paid to a *person under a legal disability or to dependants*, if not registered in accordance with the Act will not, nor will the payment of the sum payable under the agreement, exempt from liability the person by whom the compensation is payable unless he proves that the failure to register was not due to any neglect or default on his part.

(3) *A composition agreement* if not registered in accordance with the Act will not, nor will the payment of any sum payable thereunder, exempt the employer from liability under the Act.

Where it appears to the Registrar of the County Court on any information which he considers sufficient that an agreement to which this section applies ought not to be registered by reason of the inadequacy of the sum or amount agreed to be paid, or by reason of the agreement having been obtained by fraud or undue influence or other improper means, he may refuse to record the memorandum and refer the matter to the Judge who may make such order as in the circumstances he may think just.

In the case of a *composition agreement*, the Registrar or, if the matter is referred to him, the Judge, shall, in determining whether or not the sum agreed to be paid is adequate, have regard to the question whether or not liability to pay compensation under the Act is doubtful.

Alternative remedies against employer (*l*).—When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in the Act affects any civil liability of the employer, and the workman may, at his option, either claim compensation under the Act or take proceedings independently of the Act; but the employer is not liable to pay compensation both independently of and under the Act and is not liable to any pro-

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(*l*) S. 29.

ceedings independently of the Act except in case of such personal negligence or wilful act (*m*).

If, however, within the time limited for taking proceedings under the Act, an action for damages for injury caused by accident is brought independently of the Act, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but for which he would have been liable to pay compensation under the Act, the action must be dismissed, but the Court in which the action is tried, or by which the appeal is heard, must, if the plaintiff so choose, assess such compensation but may deduct therefrom all or part of the costs caused by the plaintiff bringing the action instead of proceeding under the Act (*n*).

Remedies both against employer and stranger.—Where the injury for which compensation is payable under the Act, or any scheme certified under the Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

(i) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under the Act or such scheme, but may not recover both damages and compensation.

(ii) If the workman has recovered compensation under this Act or such scheme, the person by whom it was paid and any person called on to pay an indemnity under s. 6 of the Act is entitled to be indemnified by the person so liable to pay damages, and all questions as to the right to and amount of any such indemnity must, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under the Act.

Certified Schemes.—If the Registrar of Friendly Societies certifies (i) that any scheme of compensation, benefit or insurance for workmen in any employment, provides scales of compen-

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(*m*) As to what constitutes an exercise by the workman of his option, see *Bennett* v. *Whitehead, Ltd.*, [1926] 2 K. B. 380; 135 L. T. 329; 42 T. L. R. 598.

(*n*) Alternatively the appellate tribunal may, instead of itself assessing compensation, remit the case to the County Court for the assessment of compensation, directing the County Court to deduct such costs from the compensation (*ibid.*).

sation not less favourable to the workmen and their dependants than the corresponding scales contained in the Act, and (ii) that, where the scheme provides for contribution by the workmen, it confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under the Act, and (iii) that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, while the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of the Act (*o*). *Except by substituting for the provisions of the Act the provisions of a certified scheme, it is not possible to contract out of the Act* (*p*).

(*o*) S. 31 (1). No scheme shall be certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling the workman to withdraw from the scheme (s. 31 (3)).

(*p*) S. 1 (3).

CHAPTER IV.

INDUCING BREACH OF CONTRACT—INTERFERENCE WITH FREEDOM OF ACTION—ENTICING AWAY SERVANTS—SEDUCTION.

SECTION 1.—*Inducing Breach of Contract and Interference with Freedom of Action.*

In the previous chapters we have dealt with the violation of rights of property and rights to the enjoyment of property. But even where no property is involved, it is a tort to interfere unjustifiably with the exercise of any right. An early illustration is afforded by the case of *Ashby* v. *White* (*a*), where it was held that the defendant was liable to an action on the case for unjustifiably hindering the plaintiff from exercising his legal right to vote at a Parliamentary election, the rule being thus expressed by Lord Holt, whose judgment was upheld by the House of Lords: "The ground of law is plain and certain and indeed universal, that when any man is injured in his right, by being either hindered in, or deprived of, the enjoyment thereof, the law gives him an action to repair himself." And in such a case, the plaintiff is not bound to prove that he has suffered any actual damage; and it is equally a tort if, though the defendant has not himself violated any right of the plaintiff, he has procured the violation of any right, either by procuring a tort or a breach of contract (*b*).

Of recent years this principle has come into prominence in several important cases in which the plaintiff has complained either of unfair trade competition, or of being boycotted, or otherwise hindered from carrying on his trade, profession, or occupation (*c*).

(*a*) See *ante*, p. 8. For an illustration of interference with rights of personal safety, see *Wilkinson* v. *Downton* (*ante*, p. 495).

(*b*) *Lumley* v. *Gye*, 2 E. & B., at pp. 232—234; 22 L. J. Q. B. 463; 95 R. R. 501.

(*c*) See, in particular, *Mogul S.S. Co.* v. *McGregor, Gow & Co.*, [1892] A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; *Allen* v. *Flood*, [1898] A. C. 1;

1. " It is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference " (*d*). Accordingly, if A, without legal justification, induces B to *break his contract* with C, he is liable to an action of tort at the suit of C (*e*).

2. It is also a violation of legal right if A, by any unlawful means (*e.g.*, by unjustifiable compulsion, intimidation or threats) obstructs *or* interferes with B in the exercise of his trade, profession or calling, or prevents third persons from *entering into or continuing contracts* with him (*f*).

3. In neither of these two cases is it necessary for the plaintiff to prove malice in the sense of spite or ill-will (*g*).

4. A has no cause of action against B merely because he has suffered damage from an act which B had a right to do, as, for example, where B, *without using any unlawful means*, induces third persons not to *enter into or continue* a contract with A (*h*),

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67 L. J. Q. B. 119; 77 L. T. 717; *Quinn* v. *Leathem*, [1901] A. C. 495; 70 L. J. P. C. 76; 85 L. T. 289; *South Wales Miners' Federation* v. *Glamorgan Coal Co., Ltd.*, [1905] A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 21 T. L. R. 441; *Conway* v. *Wade*, [1909] A. C. 506; 78 L. J. K. B. 1025; 101 L. T. 248; 25 T. L. R. 779; *Pratt* v. *British Medical Association*, [1919] 1 K. B. 244; 88 L. J. K. B. 628; 120 L. T. 41; 35 T. L. R. 14; *Hodges* v. *Webb*, [1920] 2 Ch. 70; 89 L. J. Ch. 273; 123 L. T. 80; 36 T. L. R. 311; *Davies* v. *Thomas* [1920] 2 Ch. 189; 89 L. J. Ch. 338; 123 L. T. 456; 36 T. L. R. 571; *Ware & De Freville Ltd.* v. *Motor Trade Association*, [1921] 3 K. B. 40; 90 L. J. K. B. 949; 125 L. T. 265; 37 T. L. R. 213 (approving *Hodges* v. *Webb* (*ubi supra*) and disapproving certain *dicta* in *Pratt's Case* (*ubi supra*) see [1921] 3 K. B., at p. 91); *Sorrell* v. *Smith*, [1925] A. C. 700; 94 L. J. Ch. 347; 133 L. T. 370; 41 T. L. R. 529. Many of these cases relate to Trade Union disputes, with regard to which the law was altered by the Trade Disputes Act, 1906 (see *post*, p. 650).

(*d*) *Quinn* v. *Leathem*, [1901] A. C., at p. 510; 70 L. J. P. C. 76.

(*e*) *South Wales, etc., Federation* v. *Glamorgan Coal Co.* (*ubi supra*). No general rule has been laid down as to what constitutes justification. In the *Mogul Case* (*ubi supra*) it was however, said by Bowen, L.J., that, in determining whether or not there was justification, the points for consideration were " the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach."

(*f*) *Mogul Case*, [1892] A. C., at p. 48; *Quinn* v. *Leathem*, [1901] A. C., at pp. 534, 535; *Ware & De Freville* v. *Motor Trade Association*, [1921] 3 K. B., at pp. 82-84. Here again no general rule has been laid down as to what constitutes justification.

(*g*) *Pratt* v. *British Medical Association*, [1919] 1 K. B., at p. 266, and authorities there cited.

(*h*) *Ware & De Freville* v. *Motor Trade Association*, [1921] 3 K. B., at p. 70; *Davies* v. *Thomas*, [1920] 2 Ch., at p. 197. A threat does not fall within the description of illegal means unless it is a threat to commit an illegal act (*Sorrell* v. *Smith* (*ubi supra*).

or interferes with or injures A's business by legitimate trade competition (*i*).

5. A lawful act by one person does not become unlawful because done with an intent to injure another (*k*), but an act otherwise lawful does become unlawful if done by two or more persons *in combination* with an *intent to injure* another, as distinct from an intent merely to further their own trade interests (*l*).

Accordingly, a combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable. But, if the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter into it, then (in the absence of means which are in themselves unlawful, such as violence or the threat of violence or fraud), no wrong is committed and no action will lie, although damage to another ensues (*m*).

By the *Trade Disputes Act*, 1906, it is provided that "an act done by a person *in contemplation or furtherance of a trade dispute* shall not be actionable on the ground *only* that it induces some other person to break a contract of employment, or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills." This section, however, gives no protection if the breach of a contract is induced by unjustifiable threats or violence" (*n*). The Act also provides

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(*i*) *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (*ubi supra*). There is again no definition of what constitutes legitimate trade competition. The test is whether the defendant is merely exercising his own right to advance his own interests, or whether he is, without justification, preventing the plaintiff from exercising his similar rights. Thus, in an old case (*The Gloucester Grammar School Case*, cited [1892] A. C., at p. 52), it was held that for the setting up of a new school to the damage of an ancient one by *alluring* the scholars no action would lie, although it would have been otherwise if the scholars had been driven away by violence or threats (see also, *ante*, pp. 494, 495).

(*k*) *Allen* v. *Flood* (*ubi supra*), and see *ante*, pp. 8, 495, 496.

(*l*) *Quinn* v. *Leathem* (*ubi supra*); *Ware & De Freville* v. *Motor Trade Association*, [1921] 3 K. B., at pp. 90, 91. The exceptional character of this rule, in making a lawful act unlawful because of an intent to injure, is pointed out in the last-mentioned case ([1921] 3 K. B., at p. 70).

(*m*) *Sorrell* v. *Smith* (*ubi supra*), reviewing the earlier authorities.

(*n*) *Conway* v. *Wade*, [1909] A. C., at p. 511. The act done must be in the course of an impending *or* existing trade dispute and for the purpose of promoting the interests of either party or both parties to it, and must not be due to private animosity, which may, if thwarted, bring into being a trade dispute (*id.*, at p. 522). The term "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which

that an act done in pursuance of an agreement between two or more persons, if so done in contemplation or furtherance of a trade dispute, shall not be actionable unless, if done without such agreement, it would have been actionable (*o*).

SECTION 2.—*Enticing away Servants. Seduction.*

Enticing away servants.—An action lies against anyone who, " with notice, interrupts the relation between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service " (*p*). This rule is not confined to cases of master and servant in the strict sense, but applies to all contracts of service (*q*). It also applies to the enticing away or harbouring of a wife or child and, in the case of a daughter, it applies though there are no consequential damages, such as those caused by the birth of a child, which would support an action of seduction (*r*).

Seduction.—An action for seduction is not brought by the woman seduced, who, by reason of the maxim *Volenti non fit injuria*, is precluded from maintaining an action against her seducer (*s*); it is brought by her parent or master in respect of any loss of services consequent upon the seduction.

In an action for seduction, the plaintiff must prove—

1. That the woman seduced was in his actual or constructive service at the time of the seduction.

2. Some actual loss of services, as by her pregnancy and

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is connected with the employment or non-employment or the terms of the employment or with the conditions of labour of any person; and " workmen " means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises (6 Edw. 7, c. 47, s. 5).

(*o*) 6 Edw. 7, c. 47, s. 1.

(*p*) *Lumley* v. *Gye*, 2 E. & B., at p. 224; 22 L. J. Q. B. 463; 95 R. R. 501. Thus, where a servant employed under a contract of service for a term breaks his contract by leaving his employment and entering the service of another employer, the second employer is liable to an action at the suit of the first, if he employed or continued to employ him with knowledge of the breach of contract (*Wilkins & Brothers, Ltd.* v. *Weaver*, [1915] 2 Ch. 322; 84 L. J. Ch. 229).

(*q*) *Lumley* v. *Gye* (*ubi supra*); *De Francesco* v. *Barnum*, 63 L. T. 514.

(*r*) *Evans* v. *Walton*, L. R. 2 C. P. 615; 36 L. J. C. P. 307; 17 L. T. 92.

(*s*) She can, however, take affiliation proceedings in a Court of Summary Jurisdiction; and in an action for breach of promise of marriage, the damages may be aggravated by proof of seduction.

confinement. Except, however, where the action is brought by a master, as distinct from a parent, the damages are not limited to those caused by the actual loss of service, but may be exemplary.

In the case of an action for the seduction of a daughter, "no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family" (*t*). But the action is based, not on the relationship or any *quasi* relationship of parent and child, but on that of master and servant. Accordingly, where the woman seduced was the adopted daughter of, and resided with, a married woman living with her husband, it was held that an action for her seduction could not be maintained by the wife, because, while husband and wife are living together, any domestic servant employed by them is the servant of the husband and not of the wife (*u*).

And the service must exist "at the time of the seduction, and also at the time of the illness consequent upon it that deprives the plaintiff of the girl's services" (*x*). Thus, where a girl was seduced while living at home, but a child was born after her father's death, it was held that her mother could not maintain an action by reason of the ordinary household services rendered to her by the girl after her father's death (*y*).

A daughter is not in her father's service if she is permanently living away from home and maintaining a separate establishment of her own (*z*); but the mere fact that she is married does not prevent her father from maintaining an action if she is separated from her husband and lives with her father (*a*).

So also a daughter who is living with and in the service of another person is not in her father's service although she is permitted to go home for a short time once a week and during such time she assists in household duties (*b*). But as soon as

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(*t*) *Evans* v. *Walton*, L. R. 2 C. P., at p. 619.

(*u*) *Peters* v. *Jones*, [1914] 2 K. B. 781; 83 L. J. K. B. 1115; 110 L. T. 937; 30 T. L. R. 421.

(*x*) *Peters* v. *Jones*, [1914] 2 K. B., at p. 785.

(*y*) *Hamilton* v. *Long*, [1905] 2 Ir. R. 252 (approved in *Peters* v. *Jones* (*ubi supra*)). See also *Hedges* v. *Tagg* (*infra*).

(*z*) *Manley* v. *Field*, 7 C. B. (N.S.) 96; 29 L. J. C. P. 79; 121 R. R. 395.

(*a*) *Harper* v. *Luffkin*, 7 B. & C. 387; 6 L. J. K. B. 23; 31 R. R. 236.

(*b*) *Whitbourne* v. *Williams*, [1901] 2 K. B. 722; 70 L. J. K. B. 933; 85 L. T. 271; 17 T. L. R. 707. In *Hedges* v. *Tagg* (L. R. 7 Ex. 283;

an infant daughter's service with an employer ceases, the right of her father to her services revives, so that she immediately becomes in his constructive service. Accordingly, in the case of *Terry* v. *Hutchinson* (*c*), it was held that the plaintiff could maintain an action for the seduction of his daughter, who was seduced in a railway carriage while on her way home, having been dismissed from her employment. But a daughter does not cease to be in the service of her father because she is away from home on a visit (*d*), nor because employed elsewhere by a master for only part of the day, so that during the remainder of the day she is free to render services to her father; and in such a case her father can maintain an action for seduction against her master (*e*). So also, a father can maintain an action against a master who has hired his daughter for the purpose of seducing her (*f*).

Damages.—Exemplary damages may be given in an action for seduction (*g*), except when it is brought by a plaintiff who is merely the master and not the parent of the woman seduced (*h*). Conversely the defendant, in mitigation of damages, may prove that the woman seduced was of loose or immoral character (*i*).

Defences.—As a defence to the action, it may be proved (i) that the plaintiff brought about the seduction by his own acts (*e.g.*, by encouraging any improper intimacy) (*k*), or (ii) that although the defendant debauched the woman, he was not the father of the child of which she was delivered (*l*).

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41 L. J. Ex. 169), the plaintiff's daughter was in service as a governess, but was seduced during a three days' visit to the plaintiff with her employer's permission. When her confinement took place she was in the service of another employer: *Held* (i) that at the time of the seduction there was no relationship of master and servant between the plaintiff and her daughter; and (ii) that the action also failed on the ground that the confinement caused no loss of service to the plaintiff, the daughter being at that time in another situation.

(*c*) L. R. 3 Q. B. 599; 37 L. J. Q. B. 257; 18 L. T. 521.

(*d*) *Griffiths* v. *Teetgen*, 15 C. B. 344; 24 L. J. C. P. 35; 100 R. R. 376.

(*e*) *Rist* v. *Faux*, 4 B. & S. 409; 32 L. J. Q. B. 386; 8 L. T. 737; 129 R. R. 783.

(*f*) *Speight* v. *Oliviera*, 2 Stark. 493; 20 R. R. 728.

(*g*) See *Terry* v. *Hutchinson* (*ubi supra*).

(*h*) *McKenzie* v. *Hardinge*, 23 T. L. R. 15.

(*i*) *Verry* v. *Watkins*, 7 C. & P. 308.

(*k*) *Reddie* v. *Scott*, 1 Peake, 240.

(*l*) *Eager* v. *Grimwood*, 16 L. J. Ex. 236; 74 R. R. 584.

CHAPTER V.

IMPROPER USE OF LEGAL PROCESS.

SECTION 1.—*Malicious Prosecution.*

In an action for malicious prosecution, the plaintiff must prove that (1) proceedings involving damage to his fair fame, person or property, (2) which terminated in his favour, (3) were instituted against him by the defendant, (4) without reasonable and probable cause, and (5) maliciously (*a*).

1. The alternative conditions of an action for malicious prosecution are "first, that there must be damage to a man's fame, as if the matter whereof he is accused be scandalous; secondly, damage to the person, as where a man is put in danger to lose his life, or limb, or liberty; and, thirdly, damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused" (*b*).

An action for malicious prosecution *may* lie in respect of civil proceedings, but it is in very few cases that it can do so, because in an ordinary civil action none of these heads of damage can arise, for (i) if scandalous allegations are made against a man, his fair fame will be cleared at the trial of the action, if it deserves to be cleared; (ii) although a judgment, even in an ordinary action for debt, may be followed by imprisonment under s. 5 of the Debtors Act, 1869, this does not satisfy the second head of damage, because the person is not imprisoned by

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(*a*) These rules do not apply where the action is not for maliciously putting process in force for the purpose of doing what the law allows to be done, but is for maliciously abusing the process of law to effect an object not within its scope, as, *e.g.*, for the purpose of extorting property. See *Grainger* v. *Hill*, 4 Bing. (N.C.) 212; 7 L. J. C. P. 85.

(*b*) *Wiffen* v. *Bailey and Romford Urban Council*, [1915] 1 K. B., at pp. 606, 607; 84 L. J. K. B. 688; 112 L. T. 274; 31 T. L. R. 64, citing *Savile* v. *Roberts*, 2 Ld. Raym., at p. 378.

virtue of the proceedings, but only as an ultimate result of his non-compliance with his obligation to pay money; (iii) the difference between the costs which a successful defendant has to pay and those which he will receive from his opponent is not legal damage (*c*).

But an action may be brought against a person who, maliciously and without reasonable and probable cause, institutes bankruptcy or winding-up proceedings (*d*), because such proceedings necessarily involve injury to a man's credit, and the same principle applies where the goods of a debtor are taken in execution for a larger sum than is due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause (*e*). So also, an action may be brought by a person who, maliciously and without reasonable and probable cause, is arrested on civil process (*f*). An action may also be

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(*c*) *Wiffen* v. *Bailey and Romford Urban Council*, [1915] 1 K. B., at pp. 606-608. See also, *Cotterell* v. *Jones*, 11 C. B. 713; 21 L. J. C. P. 2; 87 R. R. 754.

(*d*) *Quartz Hill Gold Mining Co.* v. *Eyre*, 11 Q. B. D. 674; 52 L. J. Q. B. 488; 49 L. T. 249.

(*e*) *Churchill* v. *Siggers*, 3 E. & B., at p. 937; 23 L. J. Q. B. 308; 97 R. R. 837. If the writ of execution is void *ab initio*, an action of trespass will lie, in which no proof of malice or absence of reasonable and probable cause is necessary (*Clissold* v. *Cratchley*, [1910] 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 26 T. L. R. 409). If judgment is signed for more than is due, an execution for the full amount due under the judgment is not actionable until the judgment has been rectified (*Huffer* v. *Allen*, L. R. 2 Ex. 15; 36 L. J. Ex. 17; 15 L. T. 225).

(*f*) Arrest under civil process no longer exists except (i) in bankruptcy and winding-up proceedings (Bankruptcy Act, 1914, s. 23; Companies (Consolidation) Act, 1908, s. 176); (ii) for contempt of Court (see *Scott* v. *Scott*, [1913] A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 29 T. L. R. 420); (iii) under the Debtors Act, 1869.

The Debtors Act, 1869, practically abolished imprisonment for debt by providing that, with the exceptions therein mentioned, no person shall be imprisoned for making default in payment of a sum of money. These exceptions are (s. 4): (i) Default in payment of a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract; (ii) Default in payment of a sum recoverable summarily before a justice or justices of the peace; (iii) Default by a trustee or person acting in a fiduciary capacity and ordered by the Court to pay any sum of money in his possession or under his control (see *Marris* v. *Ingram*, 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; *Re Diamond Fuel Co.*, 13 Ch. D. 815; 49 L. J. Ch. 347; 42 L. T. 178; *Crowther* v. *Elgood*, 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; *Re Walker*, 60 L. J. Ch. 25; 63 L. T. 237); (iv) Default by a solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order (see *Re Strong*, 32 Ch. D. 342; 55 L. J. Ch. 553; 55 L. T. 3); (v) Default in payment for the benefit of creditors of any portion of a salary or other income, in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order; (vi) Default in payment of sums

brought for the malicious procurement of the issue of a search warrant (*g*).

As a general rule, therefore, an action for malicious prosecution is brought where criminal proceedings have been taken against the plaintiff—that is to say, proceedings as a result of which *punishment for an offence* may be inflicted by way of imprisonment, fine, or otherwise (*h*). But even where criminal proceed-

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in respect of the payment of which orders are authorised by the Act to be made. It is, however, provided that in all these cases no person shall be imprisoned for a longer time than one year and that nothing in the section shall alter the effect of any judgment or order of any Court for payment of money, except as regards the arrest and imprisonment of the person making default in paying such money. And, with regard to exceptions (iii) and (iv), it is provided by the *Debtors Act*, 1878 (41 & 42 Vict. c. 54), that the Court may enquire into the circumstances of the case and is to have discretionary power as to imprisoning (see *Marris* v. *Ingram* (*ubi supra*); *Re Knowles*, 52 L. J. Ch. 685; 48 L. T. 760; *Re Gent*, 40 Ch. D. 190; 58 L. J. Ch. 162; 60 L. T. 355; *Earl of Aylesford* v. *Earl Poulett*, [1892] 2 Ch. 60; 61 L. J. Ch. 406; 66 L. T. 484).

The Act also provides, by s. 5, that, subject to the provisions therein contained, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person (as to married women, see, however, *ante*, p. 148) who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court, provided that it is proved to the satisfaction of the Court that such person has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

The Act also provides, by s. 6, that, where the plaintiff in an action in the High Court proves at any time before final judgment by evidence on oath to the satisfaction of a Judge that (i) he has a good cause of action against the defendant to the extent of at least £50, and (ii) that there is probable cause for believing that the defendant is about to quit England, and (iii) that his absence will materially prejudice the plaintiff in the prosecution of the action, the Judge may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless he gives security that he will not go out of England without the leave of the Court. Where, however, the action is for a penalty or sum in the nature of a penalty, other than a penalty under a contract, the plaintiff need not prove that the absence of the defendant will prejudice the prosecution of the proceedings and the security, instead of being that the defendant will not go out of England, is to the effect that any sum recovered in the action shall be paid, or that the defendant shall be rendered to prison.

(*g*) See *Hensworth* v. *Fowkes*, 4 B. & Ad. 449; 2 L. J. K. B. 72; *Wyatt* v. *White*, 5 H. & N. 371; 29 L. J. Ex. 193; 120 R. R. 643; *Hope* v. *Evered*, 17 Q. B. D. 338; 55 L. J. M. C. 146; 55 L. T. 320.

(*h*) The mere fact that proceedings *may* terminate in imprisonment does not make them criminal proceedings: the test is whether the imprisonment is punishment for an offence or a means of enforcing obedience to an order of the Court (*Wiffen* v. *Bailey and Romford Urban Council*, *ante*, p. 654; and see *R.* v. *Whitchurch*, 7 Q. B. D. 534; 50 L. J. M. C. 99; 45 L. T. 379; *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304; 62 L. J. Q. B. 593; 69 L. T. 491; *Seldon* v. *Wilde*, [1911] 1 K. B. 701; 80 L. J. K. B. 282; 104 L. T. 194).

ings have been instituted maliciously and without reasonable and probable cause, no action will lie unless the plaintiff can prove one of the foregoing kinds of damage. Thus, where proceedings had been brought against the plaintiff for neglect to comply with a notice from the urban sanitary authority requiring him to do certain repairs to a house, it was held that no action would lie in respect of these proceedings, because (i) they did not necessarily involve damage to his fair fame; (ii) they did not necessarily result in imprisonment (though this might follow if he did not pay any fine that might have been imposed); (iii) he had not suffered legal damage merely because he had incurred expenses in excess of the costs awarded him (*i*). But the prosecution of a man for avoiding payment of his fare in a tramcar will support an action for malicious prosecution, as it is a prosecution for an act which reflects upon his character (*k*).

2. The plaintiff must prove that the proceedings terminated in his favour, if from their nature they were capable of such termination (*l*). Thus, if a man has been tried and convicted, he cannot maintain an action for malicious prosecution so long as the conviction stands, and if he has been adjudicated bankrupt, he cannot maintain an action until the adjudication has been annulled (*m*).

3. The plaintiff must prove that the proceedings were instituted by the defendant, as, *e.g.*, by laying an information before a magistrate or taking an active part in any stage of a prosecution (*n*).

4 and 5. The plaintiff must prove both *malice in fact* and

(*i*) *Wiffen* v. *Bailey and Romford Urban Council* (*ubi supra*).

(*k*) *Rayson* v. *South London Tramways Co.* (*ubi supra*), as explained in *Wiffen* v. *Bailey* (*ubi supra*).

(*l*) *Basébé* v. *Matthews*, L. R. 2 C. P., at p. 688; 36 L. J. M. C. 93; 16 L. T. 417. *Secus*, where such proof is impossible, *e.g.*, in proceedings for malicious execution (*Gilding* v. *Eyre*, 10 C. B. (N.S.) 592; 31 L. J. C. P. 174; 5 L. T. 136; 128 R. R. 847; see also *Steward* v. *Gromett*, 7 C. B. (N.S.) 191; 29 L. J. C. P. 170; 121 R. R. 451).

(*m*) *Metropolitan Bank* v. *Pooley*, 10 A. C., at pp. 216, 217; 54 L. J. Q. B. 449; 44 L. T. 653.

(*n*) See *Elsee* v. *Smith*, 1 D. & R. 97; 24 R. R. 639, and *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.) 505; 30 L. J. C. P. 257; 4 L. T. 149; 127 R. R. 746, where this point is fully discussed.

absence of reasonable and probable (*o*) *cause.* If a defendant has a reasonable and probable cause for putting the law in motion, the exercise of his legal right is not wrongful because it is prompted by malice in fact. And even if in fact he has no reasonable and probable cause his act is justified by an honest belief in its existence. But if to the absence of such cause a malicious motive is added (which may be inferred from his knowledge of the absence of reasonable and probable cause) his act becomes wrongful and actionable (*p*).

It must be noted that in false imprisonment the act of the defendant is *prima facie* unjustifiable; the plaintiff need only in the first instance prove the imprisonment, the burden then shifting to the defendant to prove some justification or excuse. In malicious prosecution, on the other hand, the act of the defendant is *prima facie* justifiable, and the plaintiff must in the first instance prove malice and absence of reasonable cause (*q*).

In practice the first essential is to prove the *absence* of reasonable and probable cause, but very slight evidence of its absence may be sufficient to call upon the defendant to prove its existence (*r*).

The question whether there is an absence of reasonable and probable cause is partly for the jury and partly for the Judge—for the jury so far as there were any facts in dispute and for the Judge whether, when those facts were found, they constituted in law an absence of reasonable and probable cause (*s*). If the facts on which the absence of reasonable and probable cause depends are not in dispute, there is nothing for the jury, and the Judge should decide the matter himself: if there are facts in dispute upon which it is necessary he should be informed in order to arrive at a conclusion on this point, those facts must be left

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(*o*) The word "probable" seems open to the same objection in this combination as in the expression "natural and probable" result (see *ante*, p. 511); perhaps, however, in both cases the word "probable" simply means provable.

(*p*) See *ante*, p. 496.

(*q*) *Abrath* v. *North Eastern Railway*, 11 A. C., at p. 255; 55 L. J. Q. B. 457; 55 L. T. 63.

(*r*) *Abrath* v. *North Eastern Railway*, 11 A. C., at p. 250. See also *Cotton* v. *James*, 1 B. & Ad., at p. 133; 8 L. J. (o.s.) K. B. 345; 35 R. R. 244; *Taylor* v. *Willans*, 2 B. & Ad., at p. 857; 1 L. J. K. B. 17; 31 R. R. 379.

(*s*) *Meering* v. *Grahame-White Aviation Co.*, 122 L. T., at p. 49. See also *Douglas* v. *Corbett*, 6 E. & B., at p. 517; 106 R. R. 694.

specifically to the jury, and upon their finding the Judge must decide as to the absence of reasonable and probable cause (*t*). What constitutes reasonable and probable cause has been thus stated: "Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this, I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourthly, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused" (*u*). It must be noted that mere honest belief does not necessarily constitute reasonable and probable cause, for if the defendant came to his conclusion rashly and inconsiderately, he was not warranted in acting on his belief (*x*). "The crucial points are—Did the prosecutor believe the story on which he acted? Was his conduct in believing it, and acting on it, that of a reasonable man of ordinary prudence?" (*y*).

The malice that must be proved is malice in fact, that is to say, some wrong or indirect motive, some motive other than that of bringing to justice a person honestly believed to be guilty (*z*). The absence of reasonable and probable cause is

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(*t*) *Brown* v. *Hawkes*, [1891] 2 Q. B., at p. 726; 61 L. J. Q. B. 151; 65 L. T. 108. See also *Douglas* v. *Corbett*, 6 E. & B., at pp. 515, 517; *Cox* v. *English*, *etc.*, *Bank*, [1905] A. C., at p. 171; 74 L. J. P. C. 62; 92 L. T. 483; *Hilliar* v. *Dade*, 14 T. L. R. 534; *Watson* v. *Smith*, 15 T. L. R. 473.

(*u*) *Hicks* v. *Faulkner*, 8 Q. B. D., at p. 171; 51 L. J. Q. B. 268. The first three questions are for the jury. *Id.*, at p. 172.

(*x*) *Douglas* v. *Corbett*, 6 E. & B., at p. 515.

(*y*) *Corea* v. *Peiris*, [1909] A. C., at p. 555; 100 L. T. 790; 25 T. L. R. 631.

(*z*) *Brown* v. *Hawkes*, [1891] 2 Q. B., at pp. 722, 723. See also *ante*, pp. 495, 496.

some evidence from which malice *may* be inferred by the jury, but it must be considered with all the other facts of the case which go to establish the existence or non-existence of malice. Thus, if, although there is no reasonable and probable cause, the jury find that the defendant had an honest belief in the plaintiff's guilt, some further evidence of malice is necessary (*a*). A prosecution which at the outset is not malicious may become so by the continuance of it after knowledge of the innocence of the accused (*b*). It was at one time doubtful whether a corporation could be guilty of malice in fact, but it is now settled that an action of malicious prosecution can be brought against a corporation (*c*).

Section 2.—*Maintenance and Champerty.*

Maintenance is a Common Law misdemeanour (*d*) for which an action on the case may be brought if special damage has been occasioned to the plaintiff by the maintenance. Maintenance is defined as being "where one officiously intermeddles in a suit . . . which in no way belongs to him, by assisting either party, with money or otherwise, in the prosecution or defence of any such suit" (*e*). It is not necessary for the plaintiff to show that the action or defence maintained against him has failed or was unfounded, or that it was maintained by procuring false evidence or in some other unlawful way (*f*).

(*a*) [1891] 2 Q. B., at pp. 726, 729.

(*b*) *Fitzjohn* v. *Mackinder*, 9 C. B. (N.S.), at p. 531; 30 L. J. C. P. 264.

(*c*) *Cornford* v. *Carlton Bank*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196; 80 L. T. 121; [1900] 1 Q. B. 22; 69 L. J. Q. B. 1020; 81 L. T. 415 (in the Court of Appeal it was conceded that the action would lie).

(*d*) See *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A. C., at p. 386; 88 L. J. K. B. 282; 120 L. T. 299; 35 T. L. R. 167. Various statutes were also passed at different times inflicting particular penalties upon various kinds of maintenance.

(*e*) Hawkins' Pleas of the Crown (8th ed.), vol. 1, at p. 454, cited, [1909] A. C., at p. 386. For other definitions, see *British Cash, etc., Conveyors, Ltd.* v. *Lamson, etc., Co., Ltd.*, [1908] 1 K. B., at pp. 1019, 1020; 77 L. J. K. B. 649; 98 L. T. 875.

(*f*) [1919] A. C., at pp. 381, 382. The doctrine of maintenance does not apply to criminal proceedings (*Grant* v. *Thompson*, 72 L. T. 264). Nor is there any analogy between the actions for maintenance and for malicious prosecution, because every person acting on behalf of the Sovereign, as all prosecutors in effect do, is justified, in the interests of society, in putting the criminal law in motion if he does so without malice and with reasonable and probable cause. There is, in such a case, no officious intermeddling in litigation that does not concern the meddler ([1919] A. C., at p. 404).

But the action for maintenance at Common Law is not an action for the invasion of a right, and can be brought only by a person who has suffered some special damage; it is not sufficient for the plaintiff to show that he has been compelled to discharge his legal obligations, or that he has incurred expenses in endeavouring to evade them (*g*).

The illegality of maintenance rests upon considerations of public policy, and as notions of public policy have changed, much of the old Common Law of maintenance has become obsolete, so that many transactions and agreements which were formerly held to amount to maintenance are now valid. Thus, the purchase of a chose in action, which was at one time considered to be maintenance, is now valid; so also a contract of indemnity is none the less valid because it may involve or contemplate the institution or defence of an action (*h*).

Justification for maintenance.—"A common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. . . . But . . . the instances which they give show the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending his rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself . . . or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, *e.g.*, as master and servant,

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(*g*) [1919] A. C., at pp. 379, 380. The rule that special damage must be proved does not apply to an action for the recovery of a penalty imposed by statute upon a particular form of maintenance (*ibid.*).

(*h*) *British Cash, etc., Conveyors, Ltd.* v. *Lamson, etc., Co., Ltd.*, [1908] 1 K. B., at pp. 1012-1015; 77 L. J. K. B. 649. The assignment of a chose in action is not invalid on the ground of maintenance merely because the *motive* of the assignee is to obtain a judgment which will enable him to take bankruptcy proceedings against the debtor for the furtherance of some ulterior object, as, *e.g.*, in order to obtain his removal from a board of directors (*Fitzroy* v. *Cave*, [1905] 2 K. B. 364; 74 L. J. K. B. 829; 93 L. T. 499; 21 T. L. R. 612).

or that which charity and compassion give a man in behalf of a poor man, who but for the aid of his rich helper, could not assert his rights " (*i*).

But, though the list of exceptions given in the preceding paragraph is not exhaustive (*k*), " the common interest must be one of a character which is such that the law recognises it " (*l*). Thus, the members of a trade may combine in order to contest a decision against one of them which threatens the interest of all carrying on the same trade, just as fellow commoners may combine to defend their rights of common (*m*). And the giving of an indemnity against actions by third parties is justifiable, if it is given in the protection of a trade or business interest. Thus, in a case to which reference has already been made (*n*), the plaintiffs and the defendants were rival manufacturers of an apparatus for conveying cash from one part of business premises to another. The defendants, by legitimate means, obtained orders from persons who were using the plaintiffs' apparatus, and gave to those persons an indemnity against any claims for breach of contract that might be made against them by the plaintiffs. It was held that the giving of the indemnity was justified by the business interest which the defendants had in the protection of their customers (*n*). But a libel action is a personal action which in point of law concerns only the parties to it, and the mere circumstance that there must or may arise in it questions of fact, in the determination of which a third party has an interest, will not constitute a common interest sufficient to justify maintenance by such third party (*o*). Thus, in the case of *Alabaster* v. *Harness* (*p*), the defendant employed

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(*i*) *Bradlaugh* v. *Newdegate*, 11 Q. B. D., at p. 11; 52 L. J. Q. B. 454. As to common interest, see also *Findon* v. *Parker*, 11 M. & W. 675; and as to charity, see *Harris* v. *Brisco*, 17 Q. B. D. 504; 55 L. J. Q. B. 423; 55 L. T. 14.

(*k*) *British Cash, etc., Conveyors, Ltd.* v. *Lamson, etc., Co., Ltd.*, [1908] 1 K. B., at p. 1014.

(*l*) *Neville* v. *London " Express " Newspaper, Ltd.*, [1919] A. C., at p. 389; 88 L. J. K. B. 282.

(*m*) *Plating Co.* v. *Farquharson*, 17 Ch. D. 49; 50 L. J. Ch. 406; 44 L. T. 389.

(*n*) *British Cash, etc., Conveyors, Ltd.* v. *Lamson, etc., Co.* (*ubi supra*).

(*o*) *Oram* v. *Hutt*, [1914] 1 Ch., at p. 104; 83 L. J. Ch. 161; 110 L. T. 187; 30 T. L. R. 55.

(*p*) [1895] 1 Q. B. 339; 64 L. J. Q. B. 76; 71 L. T. 740.

T as an electrical expert, to report upon an electric belt manufactured by him, and published his report in a pamphlet. The plaintiff, a newspaper proprietor, published an article in which he commented adversely upon the report and upon the defendant's appliances and upon T's qualifications and conduct. T in consequence brought an action for libel against the plaintiff, the action being instigated by the defendant, who employed a solicitor nominated by himself to conduct the case, and found money for the purposes of the action. The action resulted in a verdict against T, who was unable to pay the costs, and the plaintiff therefore brought an action against the defendant claiming the amount of them as damages, on the ground that the defendant had unlawfully maintained T in bringing his action. It was held that the defendant had no common interest with T justifying his maintenance of the action merely because in that action questions incidentally arose which might affect him. This case was followed in *Oram* v. *Hutt* (*q*), in which it was held that a trade union has no legal common interest in a slander action brought by one of its officers, even though the latter is slandered not only personally but also by way of his office so that the union is adversely affected, and, accordingly, that the payment of the officer's costs out of the funds of the union, in pursuance of an indemnity given by the union before action, was obnoxious to the law of maintenance and *ultra vires*.

As regards justification on the ground of charity, it has been held that assistance given to a poor man by a rich man is none the less charitable merely because it is also induced by common religious sympathy (*r*).

Champerty.—"Champerty is a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute. . . . Every champerty is maintenance, but every maintenance is not champerty, for champerty is but a species of maintenance, which is the genus" (*s*).

(*q*) *Ubi supra*.

(*r*) *Holden* v. *Thompson*, [1907] 2 K. B. 489; 78 L. J. K. B. 889; 97 L. T. 138; 23 T. L. R. 529.

(*s*) *Neville* v. *London "Express" Newspaper*, [1919] A. C., at p. 382; 88 L. J. K. B. 649, citing Coke Inst. 2, p. 208.

Any bargain whereby the one party is to assist the other in recovering property and is to share in the proceeds of the property, is illegal (*t*). "A contract by a person to communicate information on terms of getting a share of any property that may thereby be recovered by the person to whom information is to be given, and nothing more, is not champerty. . . . But if the arrangement come to is not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered shall himself recover the property or actively assist in the recovery of it by procuring evidence or similar means, then I think the arrangement is contrary to the policy of the law" (*u*).

By s. 4 of the *Attorneys and Solicitors Act*, 1870 (*x*), a solicitor may make any agreement in writing with his client as to his remuneration, although he cannot receive any amount payable under the agreement unless the taxing master considers it fair and reasonable. But to guard against champerty, it is provided by s. 11 that "nothing in this Act contained shall be construed to give validity to any purchase by a solicitor of the interest, or any part of the interest, of his client in any suit, action, or other contentious proceeding to be brought or maintained, or to give validity to any agreement by which a solicitor, retained or employed to prosecute any such suit or action, stipulates for payment only in the event of success in such action, suit, or proceeding" (*y*).

(*t*) *Hutley* v. *Hutley*, L. R. 8 Q. B., at p. 115; 42 L. J. Q. B. 52; 28 L. T. 63, citing *Sprye* v. *Porter*, 7 E. & B. 58; 26 L. J. Q. B. 64; 110 R. R. 498.

(*u*) *Rees* v. *De Bernardy*, [1896] 2 Ch., at p. 447; 65 L. J. Ch. 656; 74 L. T. 585.

(*x*) *Ante*, p. 158.

(*y*) See *Re Attorneys and Solicitors Act*, 1870, 1 Ch. D. 573; *Wild* v. *Simpson*, [1919] 2 K. B. 544; 88 L. J. K. B. 1085; 121 L. T. 326; 35 T. L. R. 576. See also *Re A Solicitor*, [1912] 1 K. B. 302; 81 L. J. K. B. 245, where it was held to be champerty for a solicitor to conduct proceedings for the recovery of debts upon the terms of getting a percentage upon the amount recovered.

CHAPTER VI.

FRAUD, DEFAMATION AND OTHER ACTIONABLE LANGUAGE.

SECTION 1.—*Fraud.*

An action of deceit lay at Common Law whenever the defendant had made a fraudulent misrepresentation of fact, with intent to induce the plaintiff to act upon it and had induced the plaintiff to act upon it to his loss (*a*). This cause of action usually arose where, by the fraudulent misrepresentation, the plaintiff had been induced to enter into a contract with the defendant himself, and the rules applicable to such cases have already been discussed (*b*).

But an action of fraud will also lie when by the fraud of the defendant the plaintiff has been induced to enter into a contract with a third person, as, for example, where a financial agent fraudulently induced the plaintiff to take shares in a company (*c*). And, even though the plaintiff has not actually been induced to enter into any contract with the defendant or a third person, he may maintain an action of deceit if he has suffered damage through acting on the fraudulent misrepresentations of the defendant. Thus, in the case of *Richardson* v. *Silvester* (*d*), the defendant inserted in a newspaper an advertisement for the letting by tender of a farm: the plaintiff believing in the *bona fides* of the advertisement, incurred expense in inspecting the property and employing persons to value it: the defendant, however, knew that the farm was not to let, and that he had no power to let it, and inserted the advertisement to serve some purpose of his own:

(*a*) Bullen & Leake's Pleadings (3rd ed.), p. 333.

(*b*) *Ante*, pp. 89, 90. The effect of fraud upon conveyances and transfers of property has also been noted (*ante*, pp. 28-30).

(*c*) See *Gibbs* v. *Guild*, 8 Q. B. D. 296; 9 Q. B. D. 59; 54 L. J. Q. B. 313; 46 L. T. 248.

(*d*) L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; 29 L. T. 393.

it was accordingly held that these facts disclosed a cause of action for deceit.

Fraudulent representations as to a person's credit.—After the passing of the Statute of Frauds no action could be brought upon a *guarantee* in the absence of the written evidence required by s. 4 of that statute (*e*). But, in the course of the 18th century, there was a series of cases, commencing with *Pasley* v. *Freeman* (*f*), in which the defendant was charged, not *ex contractu* upon a *promise* to answer for the solvency of another, but *ex delicto* upon a false *representation* as to the character or credit of another. This, however, was considered to be an evasion of the Statute of Frauds, and therefore in 1828 Lord Tenterden's Act (*g*) made it necessary that there should be written evidence when credit was given on the faith of a representation as well as when it was given on the faith of a promise (*h*). By s. 6 of this Act, it is provided that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods *upon* (*i*), unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The section applies only to *fraudulent* misrepresentations; it does not apply to innocent misrepresentations in which the cause of action is a negligent breach of duty (*k*). It applies, however, not only where the representation is made for the benefit of a third person alone, but also where it is made in order that the party to be charged may obtain a benefit from the credit, money or goods obtained by such third person (*l*).

Under Lord Tenterden's Act, the writing must be signed "by

(*e*) *Ante*, pp. 68, 69.

(*f*) (1789), 3 T. R. 51; 1 R. R. 634.

(*g*) The Statute of Frauds Amendment Act (9 Geo. 4, c. 14).

(*h*) For a full explanation, see *Lyde* v. *Barnard*, 1 M. & W. 101; 5 L. J. Ex. 117; 46 R. R. 269.

(*i*) The Act is printed as in the text, but must be read either as if it were "may obtain money or goods upon credit" or "may obtain credit, money or goods upon such representation" (*Lyde* v. *Barnard*, 1 M. & W., at pp. 104, 105).

(*k*) *Banbury* v. *Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158; 34 T. L. R. 518.

(*l*) *Pearson* v. *Seligman*, 48 L. T. 842.

the *party* to be charged therewith; the signature of an agent will not suffice " (*m*). Accordingly, the signature of one partner in a firm does not render the other partners liable (*n*); nor is a corporation (which is a " person " within the meaning of the Act) liable for a false representation of the kind contemplated by the Act made in a letter written and signed by its agent (*o*).

Section 2.—*Defamation.*

Defamation consists in the publication, without justification or excuse, of that which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule (*p*). If the publication is by writing, printing, pictures, effigies (*q*), or in any other permanent form, it is a *libel*; if by words only, it is a slander: libel is both a civil wrong and a criminal offence, slander is only a civil wrong (*r*): in libel it is not necessary for the plaintiff to prove that he has suffered any special damage, but in slander, with some exceptions, proof of some special damage is necessary (*s*).

The *plaintiff* in an action of defamation must prove—

1. That the matter of which he complains was published by the defendant; and

2. That it was published of and concerning him; and

3. That it is defamatory in character; and

4. In slander, subject to certain exceptions, that he has thereby suffered special damage.

(*m*) [1918] A. C., at p. 713, and see *Swift* v. *Jewsbury*, L. R. 9 Q. B. 301; 43 L. J. Q. B. 56; 30 L. T. 31.

(*n*) *Williams* v. *Mason*, 28 L. T. 232.

(*o*) *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560; 70 L. J. K. B. 282; 85 L. T. 3. As to a corporation being a person, see also [1918] A. C. pp. 708, 714.

(*p*) *Parmiter* v. *Coupland*, 6 M. & W., at p. 108; 9 L. J. Ex. 202; 55 R. R. 529.

(*q*) See *Monson* v. *Tussauds, Ltd.*, [1894] 1 Q. B. 671; 63 L. J. Q. B. 454; 70 L. T. 335.

(*r*) For the historical reasons for this distinction, see *Jones* v. *Jones*, [1916] 2 A. C., at pp. 489, 490; 85 L. J. K. B. 1519; 32 T. L. R. 705. Spoken words, though not criminal merely because defamatory, may be punishable criminally as being seditious, blasphemous or obscene, or a contempt of Court, or a solicitation to commit a crime.

(*s*) See *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794; *Jones* v. *Jones* (*ubi supra*). As to the periods of limitation for actions of libel and slander, see *ante*, p. 506.

The *defendant* may in answer—

1. Justify the libel or slander; *i.e.*, set up that it is true;

2. Allege that the publication was privileged;

3. Allege that the matter complained of was fair comment on a matter of public interest;

4. In case of a libel contained in a newspaper, set up the statutory defence under s. 2 of Lord Campbell's Libel Act, 1843.

Defamation is *prima facie* unjustifiable, so that the plaintiff need not in the first instance prove any malice in fact; but if the defendant sets up a plea of *qualified* privilege or fair comment, the plaintiff may in answer prove the existence of malice in fact (*t*).

Publication by the defendant.—The plaintiff must prove publication to a third party (*u*). Communication by the defendant to his wife is not publication, because for this purpose husband and wife are one (*x*); but communication by the defendant to the plaintiff's wife is a publication (*y*).

The contents of a telegram (*z*) or postcard (*a*) are published to the clerks and postmen through whose hands it passes. So also, the contents of a letter are published to a clerk of the defendant to whom they are dictated, and to a clerk of the plaintiff by whom they are read, in the ordinary course of business. Thus, in the case of *Pullman* v. *Hill & Co.*, the defendants' managing director dictated a letter to a clerk, who took it down in shorthand, typed it out in full upon a typewriter and gave it to an office boy to copy in a press; when the

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(*t*) See *ante*, p. 495, 496. "If A utters a slander of B, even if he be a stranger to him, the averment that A maliciously spoke such words of B is established by simply proving the uttering of words taken to be false until the contrary appears. In such an action, the word 'maliciously' may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed" (*South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A. C., at p. 250; 74 L. J. K. B. 525). Even an indictment for libel need not allege that it was published "maliciously." (*R.* v. *Munslow*, [1895] 1 Q. B. 758; 64 L. J. M. C. 138; 72 L. T. 301).

(*u*) In criminal proceedings publication to the prosecutor is sufficient, the essence of the criminal offence being its tendency to cause a breach of the peace (*R.* v. *Adams*, 22 Q. B. D. 66; 58 L. J. M. C. 1).

(*x*) *Wennhak* v. *Morgan*, 20 Q. B. D. 635; 57 L. J. Q. B. 241; 59 L. T. 28.

(*y*) *Wenman* v. *Ash*, 13 C. B. 836; 22 L. J. C. P. 190; 98 R. R. 761.

(*z*) *Williamson* v. *Freer*, L. R. 9 C. P. 393; 43 L. J. C. P. 161; 30 L. T. 332.

(*a*) *Sadgrove* v. *Hole*, [1901] 2 K. B. 1; 70 L. J. K. B. 455; 84 L. T. 647.

letter reached its destination it was opened by one of the plaintiff's clerks and read by two other clerks: it was accordingly held that there was a publication, both to the plaintiff's servants and to the defendant's servants (*b*). But there is no publication where a letter is opened and read by a person by whom the defendant has no reason to believe that it will be read (*c*).

A person who publishes a libel or slander is, in general, liable to an action, even if he does so innocently and without negligence (*d*) or by mistake (*e*). But a person who is not the first or main publisher of a work containing a libel, and has only taken a subordinate part in disseminating it in the ordinary course of his business (*e.g.*, as a newsvendor or proprietor of a library), is not liable if he shows (i) that he is innocent of any knowledge of the libel contained in the work, and (ii) that there was nothing in the work or the circumstances in which it came to him or was disseminated by him, which ought to have led him to suppose that it contained a libel, and (iii) that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel: if these facts are proved, he may be held not to have published it (*f*). Subject to this exception, all persons are equally liable who, either themselves or by their servants or agents, are concerned in the publication of a libel. Thus, if a libel is contained in a newspaper, not only the contributor (*g*), but the proprietor of the newspaper and the printer (*h*) are all liable; so also is the seller

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(*b*) [1891] 1 Q. B. 524; 60 L. J. Q. B. 299; 64 L. T. 691.

(*c*) *Huth* v. *Huth*, [1915] 3 K. B. 32; 84 L. J. K. B. 1307; 113 L. T. 145; 31 T. L. R. 350 (letter opened by butler out of curiosity); *Powell* v. *Gelston*, [1916] 2 K. B. 615; 85 L. J. K. B. 1783; 32 T. L. R. 703 (letter addressed to A and opened by B). In *Huth* v. *Huth*, the libel was enclosed in an unsealed envelope bearing a halfpenny stamp and it was argued, without success, that this ought to be treated as a postcard. But it was suggested that there would have been publication if the letter had been opened by a Post Office servant in the course of his duty, in order to see whether the letter could properly go through the post with a halfpenny stamp.

(*d*) *Vizetelly* v. *Mudie's Library*, [1900] 2 Q. B., at p. 179; 69 L. J. Q. B. 645. (*e*) *Shepheard* v. *Whitaker*, L. R. 10 C. P. 502; 32 L. T. 402.

(*f*) *Vizetelly* v. *Mudie's Library*, [1900] 2 Q. B., at p. 180, following *Emmens* v. *Pottle*, 16 Q. B. D. 354; 55 L. J. Q. B. 51; 53 L. T. 808. So also a porter who merely delivers a parcel containing libellous handbills is not liable if he was ignorant of their contents (*Day* v. *Bream*, 2 M. & Rob. 54).

(*g*) *Bond* v. *Douglas*, 7 C. & P. 626; *Brown* v. *Croome*, 2 Stark. 297 (libellous advertisement)

(*h*) *Emmens* v. *Pottle*, 16 Q. B. D., at p. 357; 55 L. J. Q. B. 51.

of a newspaper or other work, unless he can prove, as above stated, that the dissemination of the work was innocent and without negligence (*i*). Every sale of a work containing a libel is a new publication, so that the sale of a copy of a newspaper published more than seventeen years previously creates a fresh cause of action (*k*).

But a defendant is liable only for his own acts and those of his servants or agents (*l*), and not for unauthorised publications or repetitions by third persons (*m*). Accordingly, where a person, without authority, repeats a defamatory statement he alone is usually liable in respect of that repetition (*n*), and it is no defence that he is only repeating a general rumour (*o*): the original publisher and not the repeater is, however, liable when the first publication was made to a person who was under a moral obligation to repeat it (*p*).

Of and concerning the plaintiff.—The plaintiff must prove that the defamatory matter (i) refers, and (ii) was intended to refer to himself (*q*); *i.e.*,—

(i) " That the words published, whether by name, nickname, or description, are such as reasonably to lead persons acquainted with the plaintiff to believe that he is the person to whom the libel refers " (*r*).

(ii) That the publisher of the libel intended to refer to him. But a person publishing a libel is deemed to intend the natural meaning of his own words: " the enquiry is not what did the defendant mean in his own breast, but what did the words mean having regard to the relevant surrounding circumstances (*s*) . . .

(*i*) See *Vizetelly* v. *Mudie's Library* (*ubi supra*).

(*k*) *Duke of Brunswick* v. *Harmer*, 14 Q. B. 185; 19 L. J. Q. B. 20.

(*l*) Including persons who, as he knows and intends, will repeat the libel or slander (*Whitney* v. *Moignard*, 24 Q. B. D., at p. 631; 59 L. J. Q. B. 324).

(*m*) See *Pullman* v. *Hill & Co.*, [1891] 1 Q. B., at p. 527; 60 L. J. Q. B. 299.

(*n*) *Ward* v. *Weeks*, 7 Bing. 211; 9 L. J. (o.s.) C. P. 6. And he may be liable when the original publisher was not liable, *e.g.*, if the first publication was on a privileged occasion (see *McPherson* v. *Daniels*, 10 B. & C., at p. 273; 8 L. J. (o.s.) K. B. 14; 34 R. R. 397).

(*o*) *Watkin* v. *Hall*, L. R. 3 Q. B. 396; 37 L. J. Q. B. 125; 18 L. T. 561.

(*p*) *Derry* v. *Handley*, 16 L. T. 263.

(*q*) *Jones* v. *Hulton & Co.*, [1909] 2 K. B. 444; 78 L. J. K. B. 937; affirmed, [1910] A. C. 20; 79 L. J. K. B. 198; 101 L. T. 831; 26 T. L. R. 128.

(*r*) [1909] 2 K. B., at p. 477.

(*s*) [1909] 2 K. B., at p. 480.

the question is whether [they] would be understood by readers to apply to a particular person " (*t*).

Accordingly, if a person publishes a libel apparently intended to refer to a real person, he is liable if his language does in fact refer to and hit some individual, although he had no knowledge of that particular individual. " A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both " (*u*). Thus, in the case of *Jones* v. *Hulton & Co.*, the defendant, the proprietor and publisher of a newspaper, published an article purporting to describe what the Paris correspondent of the paper had actually seen at Dieppe, and containing these words: " ' Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing ' whispers a fair neighbour of mine excitedly in her bosom friend's ear: ' Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad.' " An action for libel was accordingly brought by Mr. Artemus Jones, a barrister, and evidence was given by his friends that they thought the article referred to him. It was held that, since the words " Artemus Jones " were used as descriptive of a real person, the plaintiff was entitled to succeed, and that it was no answer for the defendant to say that he did not intend to describe the plaintiff, because he had never heard of him: " he intended to describe some living person: he can suggest no one else; and the plaintiff proves that he is believed by his acquaintances and friends to be the person aimed at, and has suffered damage thereby " (*x*).

Of defamatory matter.—The matter which is charged as libellous must be " calculated to bring the plaintiff into hatred, contempt or ridicule " (*y*). The imputation need not be made directly or by any express assertion; it may be conveyed indirectly by any form of insinuation, as by ironical praise or figurative language, or by caricature or effigy, provided that the matter

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(*t*) *Id.*, at p. 453.
(*u*) [1910] A. C., at p. 23.
(*x*) [1909] 2 K. B., at p. 481; 79 L. J. K. B. 198.
(*y*) *Nevill* v. *Fine Arts, etc., Insurance Co.*, [1897] A. C., at p. 72; 66 L. J. Q. B. 195; 75 L. T. 606.

complained of is " susceptible of a libellous meaning in this sense, that a reasonable man could construe [it] unfavourably in such a sense as to make some imputation upon the person complaining " (*z*). But there must be a definite imputation; words merely conveying suspicion are not sufficient (*a*), nor is it enough to say that by some person or another the words might be understood in a defamatory sense (*b*), and it must be an imputation upon the plaintiff. Thus, in the case of *Australian Newspaper Co.* v. *Bennett* (*c*), the defendant described the plaintiff's newspaper as the " Market Street Evening Ananias ": it was held that those words did not necessarily convey any imputation upon the plaintiff's character in his conduct of his newspaper, and that the jury could reasonably decide that they were not defamatory of the plaintiff (*d*).

" If there is a controversy as to whether the words used are defamatory or not, it is for the Judge to determine whether they are capable of a defamatory meaning, and, that being resolved in the affirmative, it is for the jury to find whether they are actually defamatory or not " (*e*).

Where nothing is alleged which would give the words any extended meaning they must be construed in the meaning which they " would be understood by ordinary persons to bear " (*f*). But the plaintiff may allege that there were facts known *both to the person who published the alleged libel or slander and to the person to whom it was published* which would lead the latter to understand the words in a secondary sense, which was

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(*z*) *Id.*, **at p. 76.**

(*a*) *Simmons* v. *Mitchell*, 6 A. C. 156; 50 L. J. P. C. 11; 43 L. T. 710.

(*b*) *Nevill* v. *Fine Arts, etc., Insurance Co.*, [1897] A. C., at p. 73.

(*c*) [1894] A. C. 284; 63 L. J. P. C. 105; 70 L. T. 597.

(*d*) But it is in each case a question for the jury whether there is in fact an imputation upon the plaintiff personally (*id.*), and a statement with regard to his goods may amount to such an imputation if it imports a reflection on the character of his business (*South Hetton Coal Co.* v. *North Eastern News Association*, [1894] 1 Q. B., at p. 139; 63 L. J. Q. B. 293; 68 L. T. 844), *e.g.*, if it imports dishonesty or incapacity in conducting his business (*Ingram* v. *Lawson*, 6 Bing. (N.C.) 212; 9 L. J. C. P. 145; 54 R. R. 766; *Beadle* v. *United Kingdom Alliance*, 31 T. L. R. 403. As to actions by corporations for such libels, see *ante*, p. 499, n. (*c*).

(*e*) *Adam* v. *Ward*, [1917] A. C., at p. 329; 86 L. J. K. B. 849; 117 L. T. 34; 33 T. L. R. 274.

(*f*) *Capital and Counties Bank* v. *Henty*, 7 A. C., at p. 772; 52 L. J. Q. B. 232; 47 L. T. 662.

defamatory (*g*). In such a case the plaintiff must plead an *innuendo*, or statement of the special meaning intended by the words, whereby they are rendered defamatory, and must prove the facts and circumstances which caused them to bear that meaning: it is then for the Court to say whether the words can bear the meaning alleged by the innuendo and for the jury to say whether they were in fact used with that meaning (*h*).

Damage.—In libel damage is presumed, but "slander is actionable only if either (1) special damage is proved; or (2) the imputation is such and the state of facts proved is such as that the law presumes or infers damage; or (3) the case falls within the Slander of Women Act, 1891" (*i*). By the *Slander of Women Act*, 1891, it is provided that "Words spoken and published after the passing of this Act which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable: Provided always, that in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the Judge shall certify that there was reasonable ground for bringing the action."

Apart from this Act, there are only three cases in which the law presumes damage (*k*), namely:—

(i) When the words spoken impute a crime punishable with imprisonment (*l*);

(*g*) See *Capital and Counties Bank* v. *Henty*, 5 C. P. D., at p. 539; 49 L. J. C. P. 830.

(*h*) *Capital and Counties Bank* v. *Henty*, 7 A. C. 741.

(*i*) *Jones* v. *Jones*, [1916] 2 A. C., at pp. 500, 506; 32 T. L. R. 705.

(*k*) See *Jones* v. *Jones*, [1916] 2 A. C., at pp. 500, 507; 85 L. J. K. B. 1519.

(*l*) It is not sufficient that the words impute an offence punishable by fine, though involving liability to summary arrest (*Hellwig* v. *Mitchell*, [1910] 1 K. B. 609; 79 L. J. K. B. 270; 102 L. T. 110; 26 T. L. R. 244). But it is not necessary that they should impute an indictable offence (*Webb* v. *Beavan*, 11 Q. B. D. 609; 52 L. J. Q. B. 544; 49 L. T. 201), nor that they should specify any particular crime (*id.*, and see *Francis* v. *Roose*, 3 M. & W. 191; 7 L. J. Ex. 66; 49 R. R. 567, where the words "I will have you hanged" were held sufficient). It is not sufficient, however, to charge a person of a crime of which he cannot be guilty, *e.g.*, to say of a churchwarden that he stole the bell ropes of his parish, the property in the bell ropes being in the churchwardens (*Jackson* v. *Adams*, 2 Bing. (N.C.) 402; 5 L. J. C. P. 79; 42 R. R. 633; see also *Christie* v. *Cowell*, Peake 4). And in all cases the question is what "reasonable men, hearing the words, would understand by them," and therefore even the use of a word such as "thief" may not be actionable without proof of special damage if the person to whom it was said knew that it was used simply as vulgar abuse and not as imputing a felony (*Hankinson* v. *Bilby*, 2 C. & K. 440; 73 R. R. 563).

(ii) When they impute certain diseases naturally excluding the patient from social intercourse (*m*);

(iii) When words are spoken of a person following a calling, *and spoken of him in that calling*, which impute to him unfitness for or misconduct in that calling.

In the last class of cases the words used must impute to the plaintiff some impropriety or misconduct in relation to or in connection with his office, profession, or trade, or, except in the case of an *honorary* office, some unfitness or incapacity for that office, profession, or trade, as, *e.g.*, an imputation of dishonesty where the office is one of trust (*n*).

And, subject to two exceptions to be mentioned later, the words must be expressly spoken of and concerning the plaintiff in his profession, trade or calling (*o*). "Words imputing adultery, profligacy, immoral conduct, or the like, whether referring to behaviour on a particular occasion, or to conduct in general, even when spoken of a man holding an office or carrying on a profession or business, are not actionable without special damage unless they relate to his conduct in the office, profession, or business, or the imputation is connected with his professional duties" (*p*). But (i) an imputation of insolvency to a trader need not be expressly spoken of him in relation to his business, because the Court will presume that it is directed against and will affect his credit as a trader (*q*); and (ii) the

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(*m*) See *Bloodworth* v. *Gray*, 7 Man. & G. 334; 66 R. R. 720. *Secus*, if the charge is that the plaintiff at some previous time had such a disease (*Carslake* v. *Mappledoram*, 2 T. R. 473).

(*n*) *Alexander* v. *Jenkins*, [1892] 1 Q. B. 797; 61 L. J. Q. B. 634; 66 L. T. 391; *Booth* v. *Arnold*, [1893] 1 Q. B. 571; 64 L. J. Q. B. 443; 72 L. T. 310; *Jones* v. *Jones*, [1916] 2 A. C., at p. 508; 85 L. J. K. B. 1519. In the case of *Alexander* v. *Jenkins* (approved in [1916] 2 A. C., at p. 508), the rule as to honorary offices was thus expressed by Lord Herschell: "Where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which the person is said to be unfit is not an office of profit, but one merely of what has been called honour or credit, the action will not lie unless the conduct alleged be such as would enable him to be removed from or deprived of that office." Accordingly, in that case, it was held that without proof of special damage no action lay for alleging of a town councillor that "He is never sober and is not a fit man for the council."

(*o*) *Jones* v. *Jones*, [1916] 2 A. C., at pp. 491, 495; 85 L. J. K. B. 1519.

(*p*) *Jones* v. *Jones*, [1916] 2 A. C., at p. 499; 85 L. J. K. B. 1519. In this case, it was held that in the absence of special damage an action will not lie for words imputing adultery to a schoolmaster, unless spoken in reference to him as a schoolmaster.

(*q*) *Id.*, at pp. 491, 507.

same rule applies to a charge of misconduct which might cause a clergyman to be deprived of a benefice or to lose an ecclesiastical position of temporal profit (*r*).

Special Defences (*s*).

1. *Justification.*—In civil proceedings the truth of a libel or slander is an absolute defence, "because it shows that the plaintiff is not entitled to recover damages, for the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess" (*t*). Upon a plea of justification, the defendant must prove to the satisfaction of the jury that the whole libel is true in substance and in fact, not only in its allegations of fact, but also in any comments or expressions of opinion (*u*); any matter which is not of the gist or "sting" of the libel need not be justified (*x*), but the defendant must justify every material imputation upon the plaintiff (*y*), and, if the charge is general in its nature, must state in his pleading the facts upon which he relies as supporting his

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(*r*) *Id.*, at pp. 491, 492, 503. But not if he is unbeneficed or without any other preferments. *Ibid.*, and see *Gallwey* v. *Marshall*, 9 Ex. 294; 23 L. J. Ex. 78; 96 R. R. 721; *Wakeford* v. *Wright*, 39 T. L. R. 107.

(*s*) For general defences, see *ante*, p. 501. For accord and satisfaction as a defence, see *Boosey* v. *Wood*, 3 H. & C. 484; 34 L. J. Ex. 65; 11 L. T. 639; 140 R. R. 565.

(*t*) *McPherson* v. *Daniels*, 10 B. & C., at p. 272; 8 L. J. (o.s.) K. B. 14; 34 R. R. 397. In criminal proceedings, the truth of a libel is not a defence unless it was for the public benefit that it should be published (Libel Act, 1843, s. 6).

(*u*) See *Sutherland* v. *Stopes*, [1925] A. C. 47; 94 L. J. K. B. 166; 132 L. T. 550; 41 T. L. R. 106, where the plea of justification is very fully discussed. "When a plea of truth in substance and in fact is made it affirms not only . . . the facts, but it affirms all that attaches to them as their natural and reasonable meaning" ([1925] A. C., at p. 79). "In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference, or truly held that opinion, but is that the opinion and inference are both of them true" (*id.*, at p. 75).

(*x*) *Alexander* v. *North Eastern Railway*, 6 B. & S. 340; 34 L. J. Q. B. 152; 141 R. R. 432; *Sutherland* v. *Stopes* (*ubi supra*). Mere epithets which may be found in the statement of the imputation, but which add nothing to the substantive charge, need not, therefore, be separately justified ([1925] A. C., at pp. 59, 60). See also *Clarke* v. *Taylor*, 2 Bing. (N.C.), 654; 5 L. J. C. P. 235; 42 R. R. 680.

(*y*) *Smith* v. *Parker*, 13 M. & W. 459; 14 L. J. Ex. 52; 67 R. R. 678; *Helsham* v. *Blackwood*, 11 C. B. 111; 20 L. J. C. P. 187; 87 R. R. 596. The defendant may, however, expressly justify *part* of a libel containing several distinct charges (*Clarke* v. *Taylor*, 2 Bing. (N.C.), at p. 664; *Sutherland* v. *Stopes*, [1925] A. C., at p. 78).

plea of justification (*z*). The fact that the plaintiff has a bad reputation is no justification and cannot be pleaded as a defence, though it may be relevant in mitigation of damages (*a*).

2. *Fair comment.*—The defence of fair comment, which does not arise if the plea of justification is made good (*b*), is that the alleged libel is a *bona fide* criticism upon a matter of public interest. To establish this defence the defendant must show—

(i) That the matter commented upon was of *public interest*. This expression includes all State matters, the administration of justice, the public conduct of men engaged in public affairs, the management of public institutions, artistic and literary productions and dramatic performances. Whether or not a matter is of public interest is for the Judge to decide (*c*).

(ii) That the matter complained of was *criticism*, *i.e.*, an expression of opinion on existing facts. This involves three propositions (*d*). In the first place it must be comment as distinct from an allegation of fact; thus "it is one thing to *comment* on . . . the acknowledged or proved acts of a public man and quite another to *assert* that he has been guilty of particular acts of misconduct" (*e*). In the second place the facts must be truly stated: "If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails" (*f*). In the third place the comment must not contain any imputation (as, *e.g.*, of improper motives) which is not warranted by the facts: "if a criticism . . . includes such an imputation, *there being no facts to*

(*z*) *Zierenberg* v. *Labouchere*, [1893] 2 Q. B. 183; 63 L. J. Q. B. 89; 69 L. T. 172.

(*a*) *Wood* v. *Durham* (*Earl*), 57 L. J. Q. B. 547; 59 L. T. 142.

(*b*) *Dakhyl* v. *Labouchere*, [1908] 2 K. B., at p. 327; 77 L. J. K. B. 728; *Sutherland* v. *Stopes* (*ubi supra*).

(*c*) *Campbell* v. *Spottiswoode*, 3 B. & S. 769; 32 L. J. Q. B. 185; 8 L. T. 201; 129 R. R. 552; *Merivale* v. *Carson*, 20 Q. B. D. 275; 58 L. T. 331, and other authorities cited *infra*.

(*d*) *Hunt* v. *Star Newspaper Co.*, [1908] 2 K. B., at pp. 319-321; 77 L. J. K. B. 732; 98 L. T. 629; 24 T. L. R. 452.

(*e*) *Davis* v. *Shepstone*, 11 A. C., at p. 190; 55 L. J. P. C. 51; 55 L. T. 1.

(*f*) [1908] 2 K. B., at p. 320.

warrant it, it is open to the jury to find . . . that the defence of ' fair comment ' has no application " (*g*).

(iii) That the criticism is *fair comment*. This does not mean that the comment must be a *correct* criticism (*h*), but that the mode of expression must be fair and the opinion honestly held. The jury have no right to substitute their own opinion for that of the critic (*i*); the question which they must consider is this—" Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said " (*j*).

But " proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege " (*k*).

3. *Privilege*.—The publication of defamatory matter may be protected because it was made upon a *privileged occasion*. The privilege may be either (i) *absolute*, when the existence of malice in fact is immaterial (*l*), or (ii) *qualified*, when it may be rebutted by proof of express malice. It is for the Judge, and the Judge alone, to decide as a matter of law whether the occasion is privileged, unless the circumstances attending it are in dispute,

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(*g*) *Id.*, and see *Campbell* v. *Spottiswoode* (*ubi supra*), and *Joynt* v. *Cycle Trade Publishing Co.*, [1904] 2 K. B., at p. 298; 73 L. J. K. B. 752; 91 L. T. 155. But a personal attack may form part of a fair comment upon given facts truly stated, if it be a reasonaoble inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the Judge, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn. In other words, a libellous imputation is not warranted by the facts unless the jury hold that it is a conclusion which ought to be drawn from those facts (*Hunt* v. *Star Newspaper Co.*, [1908] 2 K. B., at pp. 320, 321, and see *Dakhyl* v. *Labouchere*, [1908] 2 K. B., at p. 325 (n); 77 L. J. K. B. 728).

(*h*) See *Sutherland* v. *Stopes*, [1925] A. C., at p. 62, and compare the quotation given in n. (*u*), *ante*, p. 675.

(*i*) *McQuire* v. *Western Morning News*, [1903] 2 K. B., at p. 109; 72 L. J. K. B. 612; 88 L. T. 757.

(*j*) *Merivale* v. *Carson*, 20 Q. B. D., at p. 281.

(*k*) *Thomas* v. *Bradbury, Agnew & Co.*, [1906] 2 K. B., at p. 640; 75 L. J. K. B. 726; 95 L. T. 23; 22 T. L. R. 656.

(*l*) See *Royal Aquarium, &c., Society* v. *Parkinson*, [1892] 1 Q. B., at p. 451; 61 L. J. Q. B. 409; 66 L. T. 513.

in which case the facts necessary to raise the question of law should be found by the jury (*m*).

Absolute privilege exists in the case of—

(i) Statements in Parliament (*n*).

(ii) Reports and papers published by order of either House of Parliament (*o*).

(iii) Acts of State, *e.g.*, advice tendered to the Crown by its ministers (*p*), publications in the "Gazette" by a Secretary of State (*q*) and communications made by one officer of State to another in the course of his official duty (*r*).

(iv) Statements made in the course of judicial proceedings, and, perhaps, newspaper reports of such proceedings if within s. 3 of the *Law of Libel Amendment Act*, 1888 (*s*). "No action of libel or slander lies, whether against Judges, counsel, witnesses or parties, for words written or spoken in the course of any proceeding before any Court recognised by law, and this though the words written or spoken were written or spoken maliciously, without any justification or excuse and from personal ill-will and anger against the person defamed" (*t*). This privilege extends only to proceedings in "Courts of justice and tribunals acting in a manner similar to that in which such Courts act" (*u*). Thus, it applies

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(*m*) *Adam* v. *Ward*, [1917] A. C., at p. 318; 86 L. J. K. B. 849.

(*n*) *Id.*, at pp. 324, 345.

(*o*) Parliamentary Papers Act, 1840, ss. 1, 2.

(*p*) *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B., at p. 117; 39 L. J. Q. B. 53.

(*q*) *Grant* v. *Secretary of State for India*, 2 C. P. D., at p. 453; 46 L. J. C. P. 681.

(*r*) *Chatterton* v. *Secretary of State for India*, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676; 72 L. T. 858; *Isaacs & Sons, Ltd.* v. *Cook*, [1925] 2 K. B. 391; 94 L. J. K. B. 886; 41 T. L. R. 647. See also *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94, where the principle was applied to reports made by an officer of the Army to his superior officer. (*s*) See *post*, p. 681, n. (*j*).

(*t*) *Royal Aquarium, &c., Society* v. *Parkinson* (*ubi supra*). The privilege extends to statements made for the purpose of preparing proofs for use in such proceedings (*Watson* v. *McEwan*, [1905] A. C., at p. 487; 74 L. J. P. C. 151; 93 L. T. 489). It applies also to reports made by officers of a Court in the course of their duty, *e.g.*, to the report of an official receiver made in the winding-up of a company (*Bottomley* v. *Brougham*, [1908] 1 K. B. 584; 77 L. J. K. B. 311; 99 L. T. 111; 24 T. L. R. 262; and see *Burr* v. *Smith*, [1909] 2 K. B. 306; 78 L. J. K. B. 889; 101 L. T. 194; 25 T. L. R. 542).

(*u*) *Royal Aquarium, &c., Society* v. *Parkinson*, [1892] 1 Q. B., at p. 442.

to proceedings before a Coroner's Court (*x*), before a military court of inquiry (*y*), before a Select Committee of the House of Commons (which has power to enforce the giving of evidence) (*z*), before the Disciplinary Committee of the Law Society (*a*), and before a justice of the peace on a petition for an order for the reception of a lunatic (*b*). But it does not apply to proceedings before a meeting of the London County Council for granting music and dancing licences (*c*), nor to proceedings before licensing justices (*d*), because in neither case is there a *Court* in law.

Qualified privilege exists in the case of—

(i) *Extracts* from or *abstracts* of Parliamentary papers or reports, and fair and accurate *reports* of proceedings in Parliament, public judicial proceedings, or meetings within s. 4 of the *Law of Libel Amendment Act*, 1888.

(ii) Statements made on an occasion which is privileged through the existence of some interest or duty.

(i) At Common Law a qualified privilege attaches to fair and accurate reports of Parliamentary (*e*) and judicial (*f*) proceedings,

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(*x*) *Thomas* v. *Churton*, 2 B. & S. 475; 31 L. J. Q. B. 139; 127 R. R. 423.

(*y*) *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744; 45 L. J. Q. B. 8; 33 L. T. 196.

(*z*) *Goffin* v. *Donnelly*, 6 Q. B. D. 307; 50 L. J. Q. B. 303; 44 L. T. 141.

(*a*) *Lilley* v. *Roney*, 61 L. J. Q. B. 727.

(*b*) *Hodson* v. *Pare*, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309; 80 L. T. 13.

(*c*) *Royal Aquarium, &c., Society* v. *Parkinson* (*ubi supra*). But a *qualified* privilege attaches to statements at such proceedings (*id.*).

(*d*) *Attwood* v. *Chapman*, [1914] 3 K. B. 275; 83 L. J. K. B. 1666; 30 T. L. R. 596.

(*e*) *Wason* v. *Walter*, L. R. 4 Q. B. 73; 38 L. J. Q. B. 34; 19 L. T. 409.

(*f*) *Curry* v. *Walter*, 1 B. & P. 525; 4 R. R. 717; *Lewis* v. *Levy*, E. B. & E. 537; 27 L. J. Q. B. 282; 113 R. R. 768. The privilege extends to a fair and accurate report of proceedings in open Court before magistrates upon an *ex parte* application for the issue of a summons for perjury (*Kimber* v. *The Press Association, Ltd.*, [1893] 1 Q. B. 65; 62 L. J. Q. B. 152; 67 L. T. 515); and to a charge delivered by a Judge to a grand jury (*R.* v. *The Evening News*, [1925] 2 K. B. 158; 94 L. J. K. B. 511; 132 L. T. 767; 41 T. L. R. 291). It also applies to reports of the proceedings of a quasi judicial body, *e.g.*, the General Medical Council (*Allbutt* v. *General Medical Council*, 23 Q. B. D. 400; 58 L. J. Q. B. 606; 61 L. T. 585). But it does not apply where the proceedings are unfit for publication (*Steele* v. *Brannan*, L. R. 7 C. P. 261; 41 L. J. M. C. 85; 26 L. T. 509), or where their publication has been prohibited by the Court (*R.* v. *Clement*, 4 B. & Ald. 218; 23 R. R. 260). And,

and to such reports only (*g*). But by s. 3 of the *Parliamentary Papers Act*, 1840, it was provided that in any proceeding for printing any extract from or abstract of any Parliamentary paper or report it may be shown in defence that such extract or abstract was published *bona fide* and without malice. By s. 4 of the *Law of Libel Amendment Act*, 1888 (*h*), it was provided that a fair and accurate report published in any *newspaper* of the proceedings of a public meeting (*i*), or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed under any Act of Parliament, or of any meeting of commissioners authorised to act by letters patent, Act of Parliament, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purpose, and the publication, at the request of any Government office or department, officer of State, Commissioner of police, or chief constable, of any notice or report issued by them for the information of the public shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But it is also provided that nothing in the section shall authorise the publication of any blasphemous or indecent matter, or protect the publication of any matter not of public concern and the publication of which is not for the public benefit. It is further provided that the protection afforded by the section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication appeared, a reasonable letter or statement by way of contradiction or explanation and has refused or neglected to insert the same.

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by the Judicial Proceedings (Regulation of Reports) Act, 1926, it is a criminal offence to publish, in relation to any judicial proceedings, any indecent matter, or, in relation to judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation, or restitution of conjugal rights, any particulars other than those specified by the Act.

(*g*) *Davison* v. *Duncan*, 7 E. & B. 229; 26 L. J. Q. B. 104; 110 R. R. 572.

(*h*) 51 & 52 Vict. c. 64.

(*i*) *I.e.*, "Any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted" (*id.*).

By s. 3 of the same Act, it is also provided that "a fair and accurate report in any *newspaper* of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter" (*j*).

(ii) An occasion is privileged, and a qualified privilege exists, when a communication is made either in the discharge of some public or private *duty*, whether legal, moral or social, or in a matter in which there was a common *interest* in the party making it and the party receiving it (*k*), or where it is made in *self-defence* (*l*). "If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within narrow limits" (*m*). This rule has been stated in varying language and "the circumstances that can constitute a privileged occasion can themselves never be catalogued and rendered exact" (*n*), but, broadly speaking, this class of privilege is divided into the three heads above mentioned.

An instance of a privilege afforded by *duty* is furnished by the case of *Stuart* v. *Bell* (*o*). Here the plaintiff was a valet, who had been staying with his master at Newcastle, as guests of the defendant, who was Mayor of Newcastle. While they were there the Chief Constable of Newcastle received from the Chief Constable of Edinburgh a letter stating that the plaintiff was suspected of having committed a theft at an hotel, and suggesting a cautious inquiry. This letter was shown by the Chief Constable of Newcastle to the defendant, who, without making any enquiries, told the plaintiff's master that there had been a theft at the hotel, and that suspicion had fallen upon the plaintiff.

(*j*) From the absence of any reference to malice in this section, as compared with s. 4, it would seem that the privilege in this case is *absolute*.

(*k*) *Adam* v. *Ward*, [1917] A. C., at pp. 318, 328, 334; 86 L. J. K. B. 849; 117 L. T. 34; 33 T. L. R. 274.

(*l*) *Coward* v. *Wellington*, 7 C. & P. 531.

(*m*) *Toogood* v. *Spyring*, 1 C. M. & R., at p. 193; 3 L. J. Ex. 347; 40 R. R. 523.

(*n*) *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A. C., at p. 22; 86 L. J. K. B. 698; 114 L. T. 434; 32 T. L. R. 281.

(*o*) [1891] 2 Q. B. 341; 60 L. J. Q. B. 577; 64 L. T. 633.

It was held that it was the defendant's moral or social duty to communicate to the plaintiff's master the information received from the police. So also a communication made to a bishop with regard to the conduct of a clergyman in his diocese is privileged (*p*). So also is a communication made by one member of a family to another with a view to dissuade the latter from making an undesirable marriage (*q*). And any *answer* (*r*) to a confidential enquiry is privileged, *e.g.*, an answer to an enquiry as to the character of a servant (*s*), or as to whether a person is deserving of charitable assistance (*t*). "A trader is clearly entitled to make enquiries about the commercial credit of a person with whom he proposes to trade; he need not make those enquiries himself, he may constitute an agent to make them on his behalf . . . [and] if the enquiry be honestly and prudently made, it is impossible to fix exact limits within which it must be confined" (*u*). Thus, in the case of *London Association for the Protection of Trade* v. *Greenlands*, an unincorporated association was formed for the purpose (*inter alia*) of making enquiries as to the means and trustworthiness of individuals and firms. The association did not trade for profit; the qualification for membership was the payment of an annual subscription, in return for which a member could obtain ten enquiries in each year; if he required more than ten he paid for them at the rate of 1s. each. A member applied for information as to the standing of a company with which he proposed to deal; the secretary accordingly made an enquiry from an agent of the association, who returned a report defamatory of the company, and this report was sent by the secretary to the member who had applied for information. In an action by the company, it

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(*p*) *James* v. *Boston*, 2 C. & K. 4; 80 R. R. 818.

(*q*) *Todd* v. *Hawkins*, 8 C. & P. 88; 56 R. R. 834.

(*r*) In the cases mentioned in the preceding paragraph, the statements were volunteered, and where the duty is clear it does not matter whether the statement was volunteered or in answer to an inquiry; but in cases which are near the line the circumstance that the information is volunteered is an element for consideration (*Macintosh* v. *Dun*, [1908] A. C., at p. 399; 77 L. J. P. C. 113; 99 L. T. 64; 24 T. L. R. 705; and see *Pattison* v. *Jones*, 8 B. & C., at p. 586; 7 L. J. (o.s.) K. B. 26; 32 R. R. 490).

(*s*) *Child* v. *Affleck*, 9 B. & C. 403; 7 L. J. (o.s.) K. B. 272; 33 R. R. 216.

(*t*) *Waller* v. *Loch*, 7 Q. B. D. 169; 51 L. J. Q. B. 274; 45 L. T. 242.

(*u*) *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A. C., at p. 25; 85 L. J. K. B. 698.

was held that the secretary in making the enquiry and report was acting as the confidential agent of the member, and that the publication was made on a privileged occasion. The member might have made the enquiries himself, or he might have made them through an agent. In the latter case the agent's answer to his principal would have been privileged, and the privilege was not lost because the enquiry was made through the means afforded by the membership of a group of traders who had associated themselves for the purpose of providing an agent, through whom such enquiries were to be made (*x*).

An example of a communication made by reason of a *common interest* is afforded by the case of *Hunt* v. *Great Northern Railway Co.* (*y*). Here the plaintiff was a guard in the service of the defendants, and was dismissed on the ground of neglect of duty. The defendants published his name in a printed monthly circular addressed to their servants, stating that he had been dismissed and the reasons for his dismissal. It was held that the publication was privileged, the defendants having an interest in stating to their servants and the latter having an interest in knowing what was regarded as misconduct. In a later case, a dispute with regard to a commercial transaction having arisen between A and B, it was proposed by A to appoint the plaintiff as his arbitrator; B, however, objected to the appointment, and wrote to A a letter containing statements defamatory of the plaintiff. It was held that the letter was a communication between parties having a common interest in its subject-matter, and was therefore privileged (*z*).

The mere fact that the defendant believed in the existence of a duty or interest is not sufficient to create a privilege if in fact no duty or interest existed (*a*).

(*x*) [1916] 2 A. C., at p. 26, distinguishing *Macintosh* v. *Dun* (*ubi supra*). In that case a trade protection society was carried on for profit by certain persons unconnected with trade, who held themselves out as collectors of information which they were ready to sell to their customers, and who by inviting requests for information, were in the position of persons volunteering information (see *ante*, p. 682, n. (*r*)). It was held that publications made in the course of carrying on such a trade for profit were not made in discharge of a public or private duty.

(*y*) [1891] 2 Q. B. 189; 60 L. J. Q. B. 498.

(*z*) *Roff* v. *British, &c., Manufacturing Co. and Gibson*, [1918] 1 K. B. 677; 87 L. J. K. B. 996; 34 T. L. R. 485.

(*a*) *Hebditch* v. *MacIlwaine*, [1894] 2 Q. B. 54; 63 L. J. Q. B. 587; 70 L. T. 826; *Adam* v. *Ward*, [1917] A. C., at p. 334; 86 L. J. K. B. 849.

As to statements made in *self-defence*, the rule has been thus stated: "If a man *bona fide* writes a letter in his own defence and for the defence and protection of his interests and rights, and is not actuated by any malice, that letter is privileged" (*b*).

Malice.—In cases of qualified privilege it is for the Judge to say whether there is any evidence of express malice fit to be left to the jury, that is, whether there is any evidence on which a reasonable man could find malice (*c*). Express malice may be inferred by the jury: (i) from any extrinsic facts which show that the defendant was actuated by spite or some indirect motive, as, *e.g.*, from the publication of previous libels upon the plaintiff (*d*), or from the fact that the defendant made statements which he knew to be false (*e*); and (ii) from the terms of the publication or communication (*f*); but the language of privileged communications must not be submitted to a strict scrutiny, and the mere fact that it goes beyond the absolute exigency of the occasion is not evidence of malice (*g*); thus where a defamatory statement is made in self-defence, the defendant "will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so" (*h*).

Where a libel contains defamatory matter extraneous to the subject with respect to which the privilege exists, such matter is not only itself unprotected but may be evidence of malice which will take away protection from the matter which would otherwise be protected (*i*). But protection is not lost merely because a statement which is made on a privileged occasion is made in the presence of persons with regard to whom no interest

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(*b*) *Coward* v. *Wellington*, 7 C. & P., at p. 536. See also *Laughton* v. *Bishop of Sodor and Man*, L. R. 4 P. C., at p. 509; 42 L. J. P. C. 11; 28 L. T. 377; *Adam* v. *Ward* (*ubi supra*).

(*c*) *Adam* v. *Ward*, [1917] A. C., at p. 318; 86 L. J. K. B. 849.

(*d*) *Chubb* v. *Westley*, 6 C. & P. 436; *Barrett* v. *Long*, 3 H. L. C. 395; *Adam* v. *Ward* (*infra*).

(*e*) *Clark* v. *Molyneux*, 3 Q. B. D. 237; 47 L. J. Q. B. 230; 37 L. T. 694.

(*f*) *Adam* v. *Ward*, [1917] A. C., at pp. 318, 327.

(*g*) *Id.*, at p. 337.

(*h*) *Id.*, at p. 339; and see *Laughton* v. *Bishop of Sodor and Man* (*ubi supra*).

(*i*) *Adam* v. *Ward*, [1917] A. C., at pp. 318, 329, 348.

or duty exists, and whose presence cannot be prevented by the defendant: thus it was held that a statement which was made before a board of guardians and which would have been privileged if only guardians had been present, did not lose its protection because it was made in the presence of reporters or persons other than guardians who attended the proceedings (*k*).

Nor is protection lost from the mere fact that a communication *prima facie* privileged is published to a third person. Accordingly "if a business communication is privileged, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business" (*l*). Thus privilege is not destroyed because in the ordinary reasonable methods of business communication a matter comes before copying clerks or typists or clerks who open letters (*m*).

4. *Apology (applicable only to libels contained in public newspapers and periodicals).*—By s. 2 of *Lord Campbell's Libel Act*, 1843, it is provided that in an action for libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that the libel was inserted without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or periodical a full apology, or if such newspaper or periodical should be published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical to be selected by the plaintiff. By s. 2 of the *Libel Act*, 1845, a payment into Court by way of amends must accompany a plea under Lord Campbell's Act, and therefore no other defence denying liability can be joined with such a plea (*n*).

(*k*) *Pittard* v. *Oliver*, [1891] 1 Q. B. 174; 60 L. J. Q. B. 219; 64 L. T. 758.

(*l*) *Edmonson* v. *Birch & Co., Ltd.*, [1907] 1 K. B., at p. 382; 76 L. J. K. B. 346; 96 L. T. 413; 23 T. L. R. 234, following *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401; 70 L. T. 368.

(*m*) *Roff* v. *British, &c., Manufacturing Co. and Gibson*, [1918] 2 K. B. 677; 87 L. J. K. B. 996; 34 T. L. R. 595, following the cases last cited. In *Pullman* v. *Hill* (cited *ante*, p. 668), it was argued, without success, that the publication by the defendant to his servants was privileged, but in the later cases that decision was distinguished on the ground that the publication was not in the ordinary course of business.

(*n*) Order XXII., r. 1.

Apology in mitigation of damages.—By s. 1 of *Lord Campbell's Act*, 1843, it is provided that the defendant in *any action for defamation*, after giving notice of his intention to do so when he delivers his defence, may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff before the commencement of the action, or so soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology.

Other evidence in mitigation of damages.—By s. 6 of the *Law of Libel Amendment Act*, 1888, it is also provided that in any action for a *libel contained in a newspaper* the defendant may prove, in mitigation of damages, that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation for a libel or libels to the same purport or effect as the libel for which the action has been brought.

Section 3.—*Language Actionable on other Grounds.*

1. *Slander of title.*—An action for slander of title lies, strictly speaking, only where the defendant has made an unfounded assertion that the owner of real property has no title to it; a similar action will, however, lie where the assertion relates to goods (*o*). But the action is not, in either case, an action of defamation, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title: the plaintiff must accordingly prove both malice and special damage, as well as the falsehood of the assertion (*p*).

2. *Disparagement of goods.*—An action on the case will also lie for disparagement of the plaintiff's goods. But in order to maintain such an action it is not sufficient that the defendant has used extravagant phrases in commendation of his own goods which may be an implied disparagement of the goods of all others

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(*o*) *Wren* v. *Weild*, L. R. 4 Q. B., at p. 734; 38 L. J. Q. B. 327; 20 L. T. 1007.

(*p*) *Id.*, and see *British Railway Traffic, &c., Co.* v. *The C. R. C. Co. and the London County Council*, [1922] 2 K. B. 260; 91 L. J. K. B. 224; 126 L. T. 602; 38 T. L. R. 190 (reviewing the authorities).

in the same trade. "In order to constitute a disparagement which is, in the sense of law, injurious, it must be shewn that the defendant's representations were made of and concerning the plaintiff's goods; that they were in disparagement of his goods and untrue; and that they have occasioned special damage to the plaintiff. Unless each and all of these three things be established, it must be held that the defendant has acted within his rights and that the plaintiff has not suffered any legal *injuria*" (*q*). Thus, in the case from which the last paragraph is quoted the defendant was the proprietor of an infants' food, called V's food: in the course of his business as a chemist he sold the plaintiff's food, affixing to the plaintiff's wrappers a label advertising his own food, and containing the statement that it was "far more nutritious and heathful than any other preparation yet offered." It was held that this statement was not a disparagement of the plaintiff's goods, but a mere puffing of the defendant's own food; and also that, even if it were a disparagement and untrue, no action would lie in the absence of any evidence of special damage.

3. *Statements unjustifiably published and causing special damage.*—"That an action will lie for written or oral falsehoods, not actionable *per se* or even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title" (*r*). In order to support such an action both malice and actual damage must be proved. Thus, where the defendant maliciously published of the plaintiff that he had ceased to carry on business, it was held that the plaintiff could recover damages which he

(*q*) *White* v. *Mellin*, [1895] A. C., at p. 167; 64 L. J. Ch. 308; 72 L. T. 334. See also *ante*, p. 494. It follows accordingly that, where the defendant has merely acted within his rights by stating that his goods are better than those of the plaintiff, "an allegation that the statement was made maliciously is not enough to convert a lawful into an unlawful statement" (*Hubbuck & Sons* v. *Wilkinson*, [1899] 1 Q. B., at p. 91; 68 L. J. Q. B. 34; 79 L. T. 429; and see *ante*, p. 495).

(*r*) *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; 66 L. T. 794.

had suffered from loss of business caused by that statement (*s*). Where, however, the defendants, who were the proprietors of a music hall, incorrectly published that the plaintiff would appear at their hall during a certain week, in consequence of which she lost an engagement at another place during that week, it was held that, as the statement was published with a *bona fide* belief in its truth, the plaintiff had no cause of action (*t*).

On the same principle, the disparagement of a person's goods might be justifiable if made by a rival trader for the purpose of puffing his own goods, but actionable if the defendant was not a trade rival and had no lawful excuse for what he said (*u*).

(*s*) *Id.* See also *Riding* v. *Smith*, 1 Ex. D. 91; 45 L. J. Ex. 281, as explained in [1892] 2 Q. B., at p. 534. And, for another example of the same class of case, see *Wilkinson* v. *Downton* (*ante*, p. 495).

(*t*) *Shapiro* v. *La Morta*, 130 L. T. 623; 40 T. L. R. 201.

(*u*) *Hubbuck* v. *Wilkinson*, [1899] 1 Q. B., at p. 94. See also *White* v. *Mellin*, [1895] A. C., at p. 164; 64 L. J. Ch. 308.

PART IV.

EVIDENCE.

Every action (*a*) involves one or more *issues* of law or fact, arising out of allegations made by one party and denied by the other. Upon a trial by jury all matters of law must be decided by the Judge, and all matters of fact by the jury. But no issue of fact can be left to the decision of the jury unless the Judge decides, as a matter of law, that there is some evidence on which the jury can properly find for the party asserting the affirmative of that issue (*b*). The Judge must also decide all facts upon which the admissibility of evidence depends (*c*).

Proof of a fact is the establishment of its existence to the satisfaction of the jury (*d*). It is *direct* when the evidence immediately establishes the very fact which is sought to be proved: as, for example, if the fact to be proved is that A was in Brighton on a particular day, the evidence of a person who saw him there on that day. It is *circumstantial* or *presumptive* when the evidence establishes other facts so connected with or relevant to the fact to be proved that they support an *inference* or *presumption* of its existence: thus, from the fact that a letter was

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(*a*) This section omits many important rules that relate only to evidence in *criminal* proceedings. The reference [C. L. C.] in these notes is to Cockle's Leading Cases in Evidence.

(*b*) *Metropolitan Railway Co.* v. *Jackson*, 3 A. C. 193; 47 L. J. C. P. 303; 37 L. T. 67; [C. L. C. 5]. Or, as is elsewhere put in the same case, "if any facts have been established by evidence" from which the affirmative of the issue "may be reasonably inferred." The word "evidence" means, strictly speaking, the facts, testimony and documents which may legally be adduced to ascertain the fact under enquiry. It is also, however, used in the sense of "proof," so that the expression that X "is no evidence of" Y may mean either that X is not a legal means of proving Y or that X is not a fact from which any inference can be drawn as to Y.

(*c*) *Bartlett* v. *Smith*, 11 M. & W. 483; 12 L. J. Ex. 287; 63 R. R. 664; [C. L. C. 7.].

(*d*) Or the Judge, if the trial is without a jury or if the facts are for his decision.

properly addressed, stamped and posted a jury may infer that it reached its destination (*e*) and from the fact that a person is the holder of a bill of exchange the law presumes that he is a holder in due course (*f*).

An **inference** is a conclusion of fact which *in a particular case may* be drawn from premises of fact (*g*). For example, the fact that A was in Brighton on a particular Saturday may be inferred from the facts (i) that on that day he took a ticket from London to Brighton; (ii) that on the next day C received from him a letter with the Brighton postmark. All inferences are rebuttable; thus, in the present illustration, it is obvious that A, to rebut the inference, might prove that he took the ticket for his daughter, who also posted the letter in Brighton, having forgotten to do so in London before starting. And even in the absence of any rebutting evidence, the jury may refuse to draw an inference if they think that it is not sufficiently supported. Both direct and circumstantial evidence are equally *admissible*, but it is impossible to make any absolute comparison of their *cogency*. If proof is direct, the only uncertainties are as to the truth or accuracy of the witnesses, who may be deliberately lying or honestly mistaken: if it is circumstantial there is also an uncertainty as to whether the correct inference has been drawn. The weight of circumstantial evidence therefore depends largely upon the number of independent facts which support the inference, and where there are many such facts it will be as cogent as the testimony of one or two witnesses giving direct evidence.

A **presumption** is a conclusion which the *law* says *shall* be drawn *in all cases* from particular facts. Presumptions of law are said to be either (i) *irrebuttable* or conclusive; (ii) *rebuttable*. A conclusive presumption of law, however, amounts to a rule of substantive law and not of evidence (*h*), so that, strictly

(*e*) *Watts* v. *Vickers, Ltd.*, 86 L. J. K. B. 177; 116 L. T. 172; 33 T. L. R. 137; and see s. 26 of the Interpretation Act, 1889 (52 & 53 Vict. c. 70).

(*f*) Bills of Exchange Act, 1882, s. 30 (*ante*, p. 416).

(*g*) See *Kerr* v. *Ayr SS. Co.*, [1915] A. C., at p. 233; 84 L. J. P. C. 1; 111 L. T. 875; 30 T. L. R. 664, distinguishing an inference from a conjecture.

(*h*) As, for example, the rule that a child under seven years of age cannot have a criminal intent. See also s. 21 (2) of the Bills of Exchange Act, 1882

speaking, the only real presumptions are *rebuttable presumptions of law, i.e.*, conclusions which must be drawn in the absence of rebutting evidence. Examples of such presumptions are—

(i) The presumption that a child born during wedlock is legitimate, rebuttable only by proof that the husband could not, according to the laws of nature, be its father (*i*).

(ii) The presumption of the death of a person who has not been heard of for seven years by those who, if he were alive, would probably have heard of him (*k*).

(iii) The presumption of regularity (*omnia præsumuntur rite esse acta*), *e.g.*, that a document was executed on the day it bears date (*l*), that a person who acted in a public capacity was duly appointed (*m*), that rights exercised for a long time had a lawful origin (*n*).

Facts of which no proof is required.—These are:—

1. *Facts of which the Court takes judical notice.*—The Court will without proof take notice of all branches of English law (but not of foreign law, which must be proved by expert

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(*ante*, p. 410), as to the conclusive presumption of the delivery of a bill of exchange.

(*i*) *The Banbury Peerage Case*, 1 Sim. & St. 153; 24 R. R. 159; [C. L. C. 21]; *Burnaby* v. *Baillie*, 42 Ch. D. 282; 58 L. J. Ch. 842; 61 L. T. 634; *The Aylesford Peerage Case*, 11 A. C. 1; *Russell* v. *Russell*, [1924] A. C. 687; 93 L. J. P. 97; 131 L. T. 482; 40 T. L. R. 713.

(*k*) *Nepean* v. *Doe*, 2 M. & W 894; 46 R. R. 789; [C. L. C. 23]; *Re Rhodes*, 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652. There is no presumption of his death at any particular time (*ibid.*), though the circumstances may support an *inference* that it took place at some particular time (*e.g.*, as a result of some disaster) (*Hickman* v. *Upsall*, 20 Eq. 136; 128 R. R. 52). Where several persons perish in one disaster, no presumption as to the order in which they died was, before 1926, drawn from the fact that they were of different age or sex (*Wing* v. *Angrave*, 8 H. L. C. 183; 30 L. J. Ch. 65). But by s. 184 of the Law of Property Act, 1925, it is provided that in all cases where, after the commencement of the Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority.

(*l*) *Anderson* v. *Weston*, 6 Bing. N. C. 296; 9 L. J. C. P. 194; 54 R. R. 795; [C. L. C. 277].

(*m*) *Berryman* v. *Wise*, 4 T. R. 366; 2 R. R. 413; [C. L. C. 25].

(*n*) *Johnson* v. *Barnes*, L. R. 8 C P. 527; 42 L. J. C. P. 259; 29 L. T. 65; [C. L. C. 25].

witnesses) (*o*), of public matters connected with the government of the country (*p*) and matters of common knowledge. Accordingly, it takes judical notice of (i) all public statutes and all statutes passed since 1850 unless the contrary is provided in any such statute (*q*); (ii) the rules of Equity and Common Law; (iii) the procedure and jurisdiction of the various divisions of the High Court; (iv) general customs which have been judicially ascertained and established (*r*); (v) the relations of Great Britain with foreign States (*s*); (vi) the territorial and administrative divisions of the country; (vii) various official seals and signatures; (viii) the laws of nature (*t*), weights and measures and the coinage.

2. *Facts admitted for the purposes of the trial.*—Such admissions may be made—

(i) by the pleadings (*u*);

(ii) by answers to interrogatories (*x*), administered by one party to the other;

(iii) on notice to admit facts (*y*), or documents (*z*), served by one party on the other;

(iv) by agreement between the parties, or their representatives, either before or at the trial (*a*).

3. *Facts as to the existence of which an irrebuttable presumption of law exists* (*b*).—If the presumption is *rebuttable*, no

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(*o*) *Mostyn* v. *Fabrigas*, 1 Cowp. 161; [C. L. C. 14]; *Di Sora* v. *Phillips*, 10 H. L. C. 624; 33 L. J. Ch. 129; 138 R. R. 737. The House of Lords takes judicial notice of Scotch law and the Privy Council of Colonial law.

(*p*) As, *e.g.*, the existence of a state of war between this country and another, but *not* any particular event in the course of such war (*Commonwealth Shipping Representative* v. *P. & O. Branch Service*, [1923] A. C. 191; 92 L. J. K. B. 142; 128 L. T. 546; 39 T. L. R. 133).

(*q*) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 9.

(*r*) As, *e.g.*, the general custom giving bankers a general lien (*Brandao* v. *Barnett*, 12 Cl. & Fin., at p. 805; 69 R. R. 204; [C. L. C. 12].

(*s*) *Taylor* v. *Barclay*, 2 Sim. 213; 7 L. J. (o.s.) Ch. 65; 29 R. R. 82; [C. L. C. 15].

(*t*) *R.* v. *Luffe*, 8 East, 193; 9 R. R. 406; [C. L. C. 16].

(*u*) Order XXXII., r. 1; Order XIX., r. 13.

(*x*) Order XXXI., rr. 1, 24.

(*y*) Order XXXII., r. 4.

(*z*) Order XXXII., r. 2.

(*a*) In civil cases counsel (*Swinfen* v. *Lord Chelmsford*, 5 H. & N. 890; 29 L. J. Ex. 302; 120 R. R. 873) and solicitors (*Re Newen*, [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; 19 T. L. R. 247) have authority to make such admissions as they think fit, provided that they are not expressly forbidden to do so (*Neale* v. *Gordon-Lennox*, [1902] A. C. 465; 71 L. J. K. B. 939).

(*b*) *Ante*, p. 690.

evidence need in the first instance be given, but it may become necessary if rebutting evidence is adduced. Thus, by s. 30 of the Bills of Exchange Act, 1882, every holder of a bill of exchange is *prima facie* deemed to be a holder in due course, but if, in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (*c*).

The Burden of Proof.

1. The burden of proof or onus of proof, *in the sense of establishing a case*, is fixed by the pleadings and remains unaltered throughout the trial; if, when all the evidence on both sides is in, the party on whom the burden lies has not discharged it, he will fail (*d*). It rests, in respect of each issue, upon the party who makes the allegation which raises the issue, whether the allegation is in an affirmative or a negative form. A party who merely denies the allegations of his opponent has no burden upon him, but if he pleads a "confession and avoidance" (*i.e.*, if he admits the allegations of his opponent but sets up some additional facts in answer to them), he takes upon himself the burden of proving the matters pleaded by him. Thus—

(i) A brings against B an action for malicious prosecution, alleging, as he must, that B instituted proceedings against him without reasonable and probable cause. The burden rests upon A to prove the absence of reasonable and probable cause, not upon B to prove its existence (*e*).

(ii) A brings against B an action for breach of covenant to repair premises, alleging that B "did not repair": B pleads that he "did well and sufficiently repair." The burden of proof is upon A (*f*).

(*c*) See *ante*, Part II., Chapter III.

(*d*) *Abrath* v. *North Eastern Railway*, 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; [C. L. C. 112].

(*e*) *Abrath* v. *North Eastern Railway* (*ubi supra*).

(*f*) *Soward* v. *Leggatt*, 7 C. & P. 613; *Belcher* v. *McIntosh*, 8 C. & P. 720; 56 R. R. 867. For, if no evidence were given on either side, B would succeed (*ibid.*).

(iii) A brings against B an action for wrongful dismissal: B admits the dismissal, and pleads that it was justified. The burden of proof is upon B (*g*).

The burden of proving any fact relevant to the issue rests, in the same way, upon the party who sets up its existence or non-existence.

To the above rules there is, however, an important exception. Where one person stands in a fiduciary or confidential position towards another person and the validity of any transaction between them is in issue, the burden of proving that the transaction was not brought about by any undue influence rests upon the person occupying the position of trust or confidence (*h*).

2. The burden of proof *in the sense of adducing evidence*, coincides at first with the general burden of proof, and a party who makes an allegation must always *introduce* some evidence to support it; but as soon as he has adduced some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent. Thus, the issue whether X was alive or dead upon a certain day is raised by A, who alleges, as the basis of his case, that X was dead. The general burden of proving that X was dead rests upon A, and if at the end of the case he has not discharged this burden, he will fail. A must therefore introduce some evidence in support of his case, for if no evidence is given on either side, he will fail. A accordingly proves that X has not been heard of for seven years by those who would naturally have heard from him if he were alive: the burden then shifts to his opponent to prove that X is alive. "The test, therefore, as to the burden of proof . . . is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given" at the particular point of the case (*i*).

The *right to begin* belongs usually to the plaintiff, who, as a general rule, is bound to adduce some evidence in support of his

(*g*) *Harnett* v. *Johnson*, 9 C. & P. 206. For another instance in which the burden of proof may be shifted, see s. 30 of the Bills of Exchange Act, 1882 (*ante*, p. 416).

(*h*) *Erlanger* v. *New Sombrero Co.*, 3 A. C., at p. 1230; 48 L. J. Ch. 73; 39 L. T. 269; *Liles* v. *Terry*, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; 73 L. T. 428; *Powell* v. *Powell*, [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84.

(*i*) *Abrath* v. *North Eastern Railway* (*ubi supra*).

case. If, however, through admissions or otherwise, the whole burden of proofs lies upon the defendant, the right to begin will also, as a general rule, belong to the defendant. But in all actions in which a plaintiff claims unliquidated damages, he has the right to begin, even though the burden of proving all the issues of fact lies upon the defendant (*k*).

We now have to consider (1) what may or may not be proved; (2) how proof is effected.

Section 1.—*What facts may or may not be proved.*

The general rule is that proof is allowed of all facts in issue or relevant to the issue, and only of such facts. There are, however, some facts which, though in ordinary life they might be considered relevant, are in law considered to be irrelevant or inadmissible. There are also other facts which, though legally relevant, may in certain circumstances be inadmissible.

Facts in issue are the facts in dispute between the parties and upon the existence or non-existence of which their claim or defence is based (*l*).

Facts relevant to the issue are facts which constitute the actual details of a fact in issue [or of a fact relevant to the issue (*m*)], or which support or rebut any inference or presumption as to the existence or non-existence of a fact in issue. Thus, for example—

1. The issue is whether A is sane: "Every act of [his] life is relevant to the issue" (*n*).

2. The fact in issue is whether A at a certain date lent money to B: the fact that A at that date had no means to make the loan is relevant (*o*).

(*k*) *Mercer* v. *Whall*, 5 Q. B. 447; 14 L. J. Q. B. 267; 64 R. R. 544; [C. L. C. 118].

(*l*) The term "fact" includes all acts, events, and transactions and the existence of any mental or bodily condition. Except as hereafter mentioned, it does not include opinion or statements.

(*m*) Proof of facts relevant to the issue is, for the most part, governed by the same rules as the proof of facts in issue.

(*n*) *Wright* v. *Doe*, 4 Bing. N. C. 489; [C. L. C. 62].

(*o*) *Dowling* v. *Dowling*, 10 Ir. C. L. R. 236; [C. L. C. 52].

3. The fact in issue is whether A at a certain date had knowledge of a particular fact: the fact that A had means of knowledge is relevant (*p*).

4. The fact in issue is whether a writing published by A of B. and not in the ordinary sense of the words defamatory, conveyed a defamatory meaning: "the relations of the parties and the surrounding circumstances are relevant" (*q*).

5. The fact in issue is whether A is the owner of the land: the facts that A was in possession of the land (*r*), and that he exercised acts of ownership over it, as, *e.g.*, by cutting timber or repairing hedges (*s*), are relevant.

6. The fact in issue is whether an act was committed by A: the following facts are relevant: (i) facts showing motive or opportunity; (ii) his previous conduct, such as threats or acts of preparation; (iii) his subsequent conduct, if apparently influenced by the doing of the act, *e.g.*, attempts to destroy evidence against him or to procure false evidence (*t*).

7. Whenever any fact is in issue, every other fact forming part of the *same transaction* or *res gesta* [or as it is sometimes expressed, part of the same series of *res gestæ*] may be proved in order to explain the fact in issue; what constitutes a transaction and what facts form part of it is a question for the Judge (*u*).

Similar Facts.—When a fact is in issue, similar facts forming part of *other transactions*, whether between other persons (*res inter alios acta*) or between the same persons, are *irrelevant* unless the transactions in which they occurred are connected with, or form part of, the same series of transactions as the transaction in which the fact in issue occurred. Thus, if the fact in issue is whether a contract between A and B was made subject

(*p*) *Cotton* v. *James*, 3 C. & P. 505; 8 L. J. (o.s.) K. B. 345; 35 R. R. 244.

(*q*) *Capital and Counties Bank* v. *Henty*, 5 C. P. D., at p. 525; 49 L. J. C. P. 830; 43 L. T. 651.

(*r*) *Doe* v. *Penfold*, 8 C. & P. 536; [C. L. C. 78].

(*s*) *Jones* v. *Williams*, 2 M. & W. 218; 6 L. J. Ex. 107; 46 R. R. 611; [C. L. C. 78].

(*t*) *R.* v. *Palmer*, Stephen, "History of Criminal Law," III., 389; [C. L. C. 49]; *Moriarty* v. *London, Chatham and Dover Railway*, L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; 22 L. T. 163; [C. L. C. 105].

(*u*) *R.* v. *Birdseye*, 4 C. & P. 386.

to a certain condition, the fact that contracts between A and other persons were made subject to that condition is generally irrelevant, though it would be relevant if a general trade custom to make contracts subject to that condition were first proved (*x*). So also, when the issue is whether A has committed a particular act, the fact that he has on other occasions committed similar acts is irrelevant to prove that he committed the act in question. Thus, if the issue is whether A was negligent on a particular occasion, the fact that he was negligent on other occasions may not be proved in order to show that, from his conduct or disposition, he was likely to have been negligent on the occasion which is in question (*y*). But, if the issue is whether an act committed by A involved fraud, guilty knowledge, or some particular *state of mind*, similar acts committed by A may be relevant to prove his state of mind. Thus, to take an example from criminal law, if the question is whether A, in uttering a counterfeit coin, knew it to be counterfeit, the fact that he uttered counterfeit coin on other occasions is relevant to prove his guilty knowledge. On this principle, which applies both to civil and criminal cases, when the issue was whether a transaction by which A obtained money from B was fraudulent, other analogous transactions by which A fraudulently obtained money from other persons were held to be relevant (*z*).

Character.—In civil proceedings, the reputation of the parties is generally irrelevant to the issue. But evidence of the plaintiff's character is admissible *in mitigation of damages* in the following cases:—

1. In actions for *breach of promise* (when brought by a female)

(*x*) *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; 27 L. J. C. P. 241; 114 R. R. 780; [C. L. C. 86]. And, where the existence of a trade custom was in question, the fact that it existed in a similar trade in the same locality was held to be relevant (*Fleet* v. *Murton*, L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 6 L. T. 181).

(*y*) See *Makin* v. *Att.-Gen. for New South Wales*, [1894] A. C., at p. 65; 63 L. J. P. C. 41; 69 L. T. 778. If, however, the issue is whether A was guilty of a *system* of conduct which was negligent (*Hales* v. *Kerr*, [1908] 2 K. B. 601; 77 L. J. K. B. 870; 99 L. T. 364; 24 T. L. R. 779) or criminal (*R.* v. *Rhodes*, [1899] 1 Q. B. 77; 68 L. J. Q. B. 83; 79 L. T. 360) every detail of that system is relevant.

(*z*) See *Blake* v. *Albion Life Assurance Society*, 4 C. P. D. 94; 48 L. J. C. P. 169; 40 L. T. 211; where the principle is explained.

and for *seduction*, in both of which evidence may be given either of the plaintiff's bad reputation (*a*) or of specific acts of immorality (*b*).

2. In actions for *defamation*, in which evidence may be given of the bad general character of the plaintiff, but not of rumours or suspicions to the same effect as the libel, nor particular acts of misconduct by the plaintiff (*c*).

By Order XXXVI, r. 37, it is, however, provided that "in actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled at the trial to give evidence in chief as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence."

The character of a *witness*, whether a party or not, is indirectly relevant as affecting the credibility of his testimony, and evidence in chief may be given of his general reputation (*d*). He may also be cross-examined as to specific acts of misconduct, but, if he denies them, he cannot be contradicted (*e*).

Facts which a person is estopped from denying.—Estoppel is a principle of evidence whereby a person is precluded from denying the truth of certain matters (*f*). No estoppel can, however, prevent the operation of a rule of positive law: thus a married woman cannot by the doctrine of estoppel be deprived of the protection of a restraint upon anticipation (*g*). Estoppels may be by record, deed or conduct.

(*a*) *Foulkes* v. *Sellway*, 3 Esp. 236 (breach of promise); *Bamfield* v. *Massey*, 1 Camp. 460 (seduction).

(*b*) *Bench* v. *Merrick*, 1 C. & K. 463 (breach of promise); *Verry* v. *Watkins*, 7 C. & P. 308; [C. L. C. 97] (seduction).

(*c*) *Scott* v. *Sampson*, L. R. 8 Q. B. 491; 51 L. J. Q. B. 380; 46 L. T. 112; [C. L. C. 94].

(*d*) *R.* v. *Brown*, L. R. 1 C. C. R. 70; 36 L. J. M. C. 59; [C. L. C. 233]. It is very unusual to give such evidence.

(*e*) See further, *post*, p 720.

(*f*) See *ante*, p. 24.

(*g*) *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144; 66 L. J. Ch. 721; 77 L. T. 71.

Estoppel by record.—The most important cases of this class are estoppels arising from judgments, as to which the following are the principal rules (*h*):—

1. All judgments are conclusive proof as against all persons of their actual effect. Thus a judgment by which A recovered damages from B is conclusive proof as against C of the amount of damages recovered by A (*i*), though not of the grounds on which they were recovered (*k*). So also a judgment *in rem* by a Court of competent jurisdiction—that is to say, an adjudication pronounced upon the status of some person or subject-matter—is conclusive as against all the world as to the status of the *res* (*l*). Thus a grant of probate is conclusive evidence that the instrument proved was testamentary according to the law of this country (*m*). So also a decree of the Divorce Court for dissolution of marriage is conclusive against all the world of its dissolution (*n*). Similarly the determination by a Court of summary jurisdiction that a street is a highway repairable by the inhabitants at large is conclusive as against all persons as to the status of the street (*o*).

2. Every judgment of a Court of competent jurisdiction is conclusive proof in subsequent proceedings, between the same parties or their privies (*p*), suing or defending in the same right or capacity, both of the matters actually decided and of the

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(*h*) The rules given in the text apply to domestic judgments; as to foreign judgments, see *ante*, p. 18.

(*i*) *Green* v. *New River Co.*, 4 T. R., at p. 590.

(*k*) *Ibid.*; and see *Pritchard* v. *Hitchcock*, 6 Man. & G. 151; 12 L. J. C. P. 322; 64 R. R. 736.

(*l*) *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B., at p. 462; 65 L. J. Q. B. 616; 75 L. T. 95; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; 39 L. J. C. P. 350; 128 R. R. 738; 23 L. T. 48. There are, however, certain exceptions to this rule, see *Hill* v. *Clifford*, [1907] 2 Ch. 236; 76 L. J. Ch. 627; 97 L. T. 266; 23 T. L. R. 601.

(*m*) *Whicker* v. *Hume*, 7 H. L. C., at p. 156; 28 L. J. Ch. 396; 115 R. R. 70. See also *De Mora* v. *Concha*, 29 Ch. D. 268; affirmed *sub nom.* *Concha* v. *Concha*, 11 A. C. 541; 56 L. J. Ch. 257; 55 L. T. 522.

(*n*) But not a decree which does not alter status—*e.g.*, a decree in a suit of jactitation of marriage (*Duchess of Kingston's Case*, 20 How. State Trials, 355; [C. L. C. 53]. See also *Needham* v. *Bremner*, L. R. 1 C. P. 583; 35 L. J. C. P. 313; 14 L. T. 437).

(*o*) *Mayor of Wakefield* v. *Cooke*, [1904] A. C. 31; 73 L. J. K. B. 88; 89 L. T. 707.

(*p*) That is to say, persons claiming through or under the parties. Privies are usually divided into three classes: (i) In estate, as vendor and purchaser; (ii) In blood, as ancestor or heir; (iii) In law, as testator and executor.

grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered (*q*).

As to these points—

(i) The subsequent proceedings must be between the same parties or their privies. Accordingly the conviction of a person in criminal proceedings is not admissible against him in subsequent civil proceedings as evidence of the matter decided, the parties to the civil and criminal proceedings not being the same (*r*). Thus the fact that A was convicted on an indictment of forging a bill of exchange is not admissible evidence of the forgery in an *action* on the bill (*s*). So also a decision of quarter sessions quashing an order of justices made in affiliation proceedings and adjudging A to be the father of B's illegitimate child, does not estop B's mother, in an action brought by her against A for the seduction of B, from alleging that A is the father of the child (*t*).

(ii) A party, to be affected by a previous judgment, must sue or defend in the subsequent proceedings in the same right and character. Thus a judgment against A as administrator creates no estoppel in a subsequent action brought by him in his own right (*u*).

(*q*) *Re Bank of Hindustan, China and Japan* (*Alison's Case*), L. R. 9 Ch. at p. 25; 43 L. J. Ch. 1; 29 L. T. 519; *Conradi* v. *Conradi*, L. R. 1 P. & D., at p. 521; 36 L. J. Mat. 68. See also *The Duchess of Kingston's Case* (*ubi supra*). But this rule applies only when the judgment is pleaded as an estoppel or when there is no opportunity of pleading it. Otherwise it is only a relevant fact from which an inference may be drawn in favour of the person who adduces the judgment as evidence (*Vooght* v. *Winch*, 2 B. & Ald. 662; 21 R. R. 70; [C. L. C. 37]). Estoppels by record or deed must be pleaded, but there is some doubt as to the necessity of pleading an estoppel by conduct.

(*r*) It is *res inter alios acta* (*Leyman* v. *Latimer*, 3 Ex. D., at p. 354; 47 L. J. Ex. 470; 37 L. T. 419) As to assault, see, however, *ante*, p. 493.

(*s*) *Castrique* v. *Imrie*, L. R. 4 H. L., at p. 434; 39 L. J. C. P. 350; 23 L. T. 48. But it is conclusive as to A being a convicted felon (*ibid.*; and see rule 1, *supra*). It has, however, been held that where a convicted felon, or the personal representative of a convicted murderer who has been executed, brings any civil proceeding to establish claims, or to enforce rights, which result to the felon, or to the convicted testator, from his own crime, the conviction is admissible in evidence, not merely as proof of the conviction, but also as presumptive proof of the commission of the crime (*In the Estate of Crippen*, [1911] P. 108; 80 L. J. P. 47; 104 L. T. 224; 27 T. L. R. 253).

(*t*) *Anderson* v. *Collinson*, [1901] 2 K. B. 107; 70 L. J. K. B. 620; 84 L. T. 465; 17 T. L. R. 465.

(*u*) *Metters* v. *Brown*, 1 H. & C. 686; 32 L. J. Ex. 138; 130 R. R. 733;

(iii) The estoppel is not limited to the actual decision but " also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision " (*x*) and " to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time " (*y*).

3. No judgment is evidence " of any matter which came collaterally in question . . . nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment " (*z*).

4. Any judgment is impeachable on the ground that it was obtained by fraud (*zz*).

Estoppel by deed.—" Where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted " (*a*).

To create an estoppel there must be a distinct and positive statement of fact: thus, a recital that a vendor is seised of property can create an estoppel (*b*), but a recital that he is " seised or otherwise well entitled to an estate in fee simple " is an ambiguous statement meaning that he has an estate either at

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7 L. T. 295. See also *Leggott* v. *Great Northern Railway*, 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. 334.

(*x*) *Hoystead* v. *Commissioner of Taxation*, [1926] A. C., at p. 170; 95 L. J. P. C. 79; 134 L. T. 354; 42 T. L. R. 207.

(*y*) *Henderson* v. *Henderson*, 3 Hare, 114, cited and approved [1926] A. C., at p. 170; and see *ante*, p. 24, and cases there cited in n. (*o*). Accordingly while " the recovery of judgment in an action of trespass is only a bar to the future recovery of damages for the same injury (see *ante*, pp. 23, 24), the estoppel precludes the parties and privies from disputing any point, or matter of fact, which has been found against them " (*Outram* v. *Morewood*, 3 East, at pp. 354, 355; 7 R. R. 473; *Hoystead* v. *Commissioner of Taxation*, [1926] A. C., at pp. 166, 167.

(*z*) *The Duchess of Kingston's Case* (*ubi supra*); *North Eastern Railway Co.* v. *Dalton Overseers*, [1898] 2 Q. B. 66; 67 L. J. Q. B. 715; 78 L. T. 524; 14 T. L. R. 421 (reversed on other grounds, [1899] 1 Q. B. 1026); *Bedford* v. *Cowtan & Sons, Ltd.*, [1916] 1 K. B., at p. 989; 85 L. J. K. B. 1066; 114 L. T. 861; 32 T. L. R. 410.

(*zz*) *Id.*; and see *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695; 42 L. J. Ch. 861; 28 L. T. 459; *Vadala* v. *Lawes*, 25 Q. B. D., at p. 316; 63 L. T. 128.

(*a*) *Bowman* v. *Taylor*, 2 Ad. & E., at p. 291; 41 R. R. 437; [C. L. C. 40].

(*b*) *Id.*, at p. 294; *Onward Building Society* v. *Smithson*, [1893] 1 Ch., at pp. 14, 15; 62 L. J. Ch. 138.

law or in equity, and therefore creates no estoppel for the purpose of making the legal estate pass (*c*).

Where, however, there is in a bond or other instrument under seal a distinct recital of a particular fact, and a contract is made with reference to that recital, then, as between the parties to that instrument (and those claiming through them) (*d*), and in an action upon the instrument and not merely collateral to it, it is not competent for the party bound to deny the recital (*e*): but a party who would otherwise be bound is not precluded from impeaching the instrument itself on the ground of mistake, or illegality, or any other matter which would render it void or voidable (*f*).

Estoppel by conduct.—This class of estoppel was formerly applicable only to formal acts *in pais*, such as livery of seisin, which were considered of the same solemnity as the execution of a deed (*g*); but it has been extended to include other acts and statements which a person ought not to be permitted to deny.

Estoppel by conduct may arise either by *agreement* or *representation*.

Where two parties have *agreed* to act on the basis of the existence of certain facts, their rights must be regulated not by the actual condition of affairs, but by the conditions which they have agreed to assume as existing (*h*). Examples of this kind of estoppel have already been noticed in dealing with bailments (*i*) and bills of exchange (*k*). On the same principle a tenant, during his possession of the demised premises, cannot

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(*c*) *Heath* v. *Crealock*, 10 Ch. 22; 44 L. J. Ch. 157; 31 L. T. 650. Compare *Poulton* v. *Moore*, [1915] 1 K. B. 400; 84 L. J. K. B. 462; 112 L. T. 202.

(*d*) *Cracknall* v. *Johnson*, 11 Ch. D. 1; 48 L. J. Ch. 168; 39 L. T. 32; *Dalton* v. *Fitzgerald*, [1897] 1 Ch. 440; 66 L. J. Ch. 604; 44 L. T. 844.

(*e*) *Carpenter* v. *Buller*, 8 M. & W., at p. 212; 10 L. J. Ex. 393; 58 R. R. 680; cited and approved in *Ex parte Morgan*, 2 Ch. D., at p. 89; 45 L. J. Bk. 83; 34 L. T. 329. Where a recital is intended to be the statement only of one party it binds that party only; whether it is intended to bind one partly only, or both, is a question of construction (*Stroughill* v. *Buck*, 14 Q. B. 781; 19 L. J. Q. B. 209; 80 R. R. 395).

(*f*) *Ante*, p. 27.

(*g*) See *Lyon* v. *Reed*, 13 M. & W., at p. 309; 13 L. J. Ex. 377; 67 R. R. 593.

(*h*) *Burkinshaw* v. *Nicolls*, 3 A. C., at p. 1026; 48 L. J. Ch. 179; 39 L. T. 308.

(*i*) *Ante*, p. 299

(*k*) *Ante*, pp. 426, 427.

deny his landlord's title at the time when possession was given (*l*), though he may prove that it has since determined (*m*), nor can a licensee deny the title of his licensor (*n*).

As to estoppel by representation, the rule was thus laid down in the case of *Freeman* v. *Cooke* (*o*): "Where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, *and induces him to act on that belief, or to alter his own previous position*, the former is concluded from averring against the latter a different state of things as existing at the same time. . . . And, by the term 'wilfully' . . . in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting the truth; and conduct, by negligence or omission, where there is a duty cast upon a person . . . to disclose the truth, may often have the same effect" (*p*).

As is pointed out in this rule, it is not necessary that the representation should be express; it may arise from conduct (*q*), and even from silence or acquiescence (*r*). Where the estoppel is based upon *negligent* conduct of the defendant, the neglect must be in the transaction itself, and be the proximate cause of

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(*l*) *Morton* v. *Woods*, L. R. 3 Q. B., at p. 668; affirmed, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81.

(*m*) *Thorne* v. *Tilbury*, 3 H. & N., at p. 359; 27 L. J. Ex. 407; 117 R. R. 844; *Serjeant* v. *Nash, Field & Co.*, [1903] 2 K. B., at p. 312; 72 L. J. K. B. 630; 89 L. T. 112; 19 T. L. R. 510.

(*n*) *Doe* d. *Johnson* v. *Baytup*, 3 Ad. & E. 188; 4 L. J. K. B. 263; 42 R. R. 359.

(*o*) 2 Ex. 654; 18 L. J. Ex. 114; 76 R. R. 711; [C. L. C. 41]; following *Pickard* v. *Sears*, 6 Ad. & E. 654; 45 R. R. 538. See also *London Joint Stock Bank, Ltd.* v. *Macmillan and Arthur*, [1918] A. C. 777; 88 L. J. K. B. 55; 119 L. T. 387; 34 T. L. R. 509 (*ante*, p. 433).

(*p*) *Secus*, where there is no duty to disclose the truth (*Jones Brothers* v. *Woodhouse*, [1923] 2 K. B. 117; 92 L. J. K. B. 638; 129 L. T. 317).

(*q*) For instances, see *ante*, p. 231 (principal and agent), pp. 361, 362 (mercantile agents), p. 260 (partners).

(*r*) See, *e.g.*, *Ramsden* v. *Dyson*, L. R. 1 H. L. 129; 149 R. R. 543; *McKenzie* v. *British Linen Co.*, 6 A. C. 82; 44 L. T. 431.

leading the plaintiff into the mistake; it must also be neglect of some duty owing to the plaintiff or the general public, and not merely neglect of what would be prudent in respect to the plaintiff himself or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy (*s*).

Facts excluded by public policy.—No evidence is admissible of any facts the disclosure of which would prejudice the public interest—*e.g.*, State secrets and communications between Government offices on public matters (*t*).

In civil cases, a husband or wife cannot give evidence of non-intercourse during marriage in order to prove the illegitimacy of a child born during wedlock, such evidence being contrary to public morality (*u*). But evidence of the circumstances of the case and of the conduct of the parties is admissible to prove the impossiblity of access, and when this is done, evidence of statements by the husband or wife may be given as part of the *res gesta* (*x*).

Opinion.—A witness must, as a general rule, give evidence of facts only and not of his opinions: it is for the Court and jury to draw opinions from his testimony (*y*). But—

1. The opinion of experts is admissible upon all subjects for which "special study or experience is necessary to the formation of an opinion" (*z*)—*e.g.*, matters of science, art, medicine, or foreign law (*a*). Whether the witness is competent to give expert evidence is for the Judge to decide (*b*).

(*s*) *Swan* v. *North British Australasian Co.*, 2 H. & C., at p. 182; 32 L. J. Ex. 273; 126 R. R. 617; approved in *Longman* v. *Bath Electric Tramways, Ltd.*, [1905] 1 Ch. 646; 74 L. J. Ch. 424; 92 L. T. 743; 21 T. L. R. 373. See also *Carr* v. *London and North Western Railway*, L. R. 10 C. P. 307; 44 L. J. C. P. 109; 31 L. T. 785; and *London Joint Stock Bank* v. *Macmillan* (*ubi supra*).

(*t*) *Home* v. *Bentinck*, 2 B. & B., at p. 162; 22 R. R. 748; *Stace* v. *Griffith*, L. R. 2 P. C., at p. 428; 20 L. T. 197.

(*u*) *Russell* v. *Russell*, [1924] A. C. 687; 93 L. J. P. 97; 131 L. T. 482; 40 T. L. R. 713.

(*x*) See *ante*, p. 691, and cases cited in n. (*i*).

(*y*) *Carter* v. *Boehm*, 3 Burr. 1905; [C. L. C. 104].

(*z*) *Id.*

(*a*) *Folkes* v. *Chadd*, 3 Dougl. 157; [C. L. C. 105].

(*b*) *Bristow* v. *Sequeville*, 5 Ex. 275; 19 L. J. Ex. 289; 82 R. R. 664. A witness may be accepted as an expert on the law of a foreign country

2. In matters with respect to which a witness cannot give positive testimony, he may speak as to his opinion or belief—*e.g.*, for the identification of persons, things, or handwriting, or in questions of physical or mental conditions (*c*).

Hearsay.—If a witness says that A told him something or produces a writing signed by A, this may or may not be hearsay: if it is hearsay it is, in general, inadmissible. Whether it is hearsay or not depends, as a rule, upon whether the *making* of the statement or its *truth* is in issue. Thus, suppose that the fact in issue is A's reason for taking a longer road in preference to a shorter one. If A's reason is that X told him the longer road was better he may prove the statement of X; but, if A alleges that the longer road *is in fact better* than the shorter, he may not prove a statement to that effect by X; in the first case he is only asking the jury to believe that X *made* the statement, whereas in the second case he is asking them to believe the truth of the statement by X.

The mere making of a statement is a *fact*, which, like any other fact may be proved if it is (i) in issue, as a libel; or (ii) relevant to the issue, as statements accompanying and explaining the nature of a transaction (*e.g.*, seditious speeches or inscriptions on banners carried by a mob) (*d*); or (iii) indirectly relevant as affecting the credibility of a witness (*e.g.*, contradictory statements made by him on other occasions) or as conduct showing the state of his mind (*e*). But, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth of any matter contained in that statement (*f*). Thus—

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although he has not practised in that country (*Nelson* v. *Wilson*, [1903] P., at p. 159; 8 L. J. (o.s.) C. P. 226; *Brailey* v. *Rhodesia Consolidated*, [1910] 2 Ch., at p. 102; 79 L. J. Ch. 494; 102 L. T. 805). But he must be an "expert skilled in the law"; see *Perlak Petroleum Maatschappij* v. *Deen*, [1924] 1 K. B. 111; 93 L. J. K. B. 158; 130 L. T. 234.

(*c*) *Fryer* v. *Gathercole*, 13 Jur. 542; 18 L. J. Ex. 389; 80 R. R. 552; [C. L. C. 107].

(*d*) *R.* v. *Hunt*, 3 B. & Ald. 566; 22 R. R. 485; [C. L. C. 258].

(*e*) Thus, where the paternity of a child is in issue, statements made by the deceased sweetheart of its mother that he intended to marry her and to support the child are admissible as evidence of his state of mind with regard to the child (*Lloyd* v. *Powell Duffryn, etc., Co.*, [1914] A. C. 733; 83 L. J. K. B. 1054; 111 L. T. 338; 30 T. L. R. 456).

(*f*) One of the fundamental objections to hearsay is "the want of the

(i) The issue is whether a deed was forged. A statement by a deceased witness to the deed that he forged it is inadmissible (*g*).

(ii) The issue is whether A was sane. Letters written to A by persons who, in writing, treated him as sane and possessing certain qualities are not admissible to prove that he was sane or possessed those qualities, being merely equivalent to statements by the writers that they believed A to be sane and to possess those qualities (*h*).

Exceptions.—In the following cases, hearsay is admissible:—

1. Where the statement is part of the *res gesta* (*i*) or where it is made by or to a person doing an act in issue or relevant to the issue, and *accompanies and explains* that act. Thus—

(i) The issue is whether A murdered B. A person in another room heard A and B fighting, and heard B exclaim "Don't, Harry!" The exclamation is admissible. B rushes into the street, and exclaims "See what Harry has done for me!" This is not part of the transaction, but a narrative of past events, and is inadmissible (*k*).

(ii) The issue is whether A is sane. Letters written *to* him are *prima facie* inadmissible. But if A acted on any of the letters, then, as all A's actions are relevant, the contents of the letters will be admissible if they reflect light upon or qualify the acts of A (*l*).

2. Where the statement relates to the *existence of any bodily or mental condition*, and is made by a person whose condition at the time of making the statement is in issue (*m*). Such statements are admissible only so far as they relate to the nature and effects of the condition. Nothing is admissible which is in the

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safeguards of cross-examination" (*Sturla* v. *Freccia*, 5 A. C., at p. 640; 50 L. J. Ch. 86; 43 L. T. 209).

(*g*) *Stobart* v. *Dryden*, 1 M. & W. 615; 5 L. J. Ex. 218; 46 R. R. 424; [C. L. C. 127].

(*h*) *Wright* v. *Doe*, 7 Ad. & E. 313; 4 Bing. (N.C.) 489; 5 Cl. & F. 670; [C. L. C. 62].

(*i*) See *Milne* v. *Leisler*, 7 H. & N., at p. 796; 31 L. J. Ex. 257; 5 L. T. 802; 126 R. R. 704.

(*k*) *R.* v. *Bedingfield*, 14 Cox, 341; [C. L. C. 56].

(*l*) *Wright* v. *Doe* (*ubi supra*).

(*m*) *R.* v. *Johnson*, 2 C. & K. 354; *Aveson* v. *Kinnaird*, 6 East, 188; 8 R. R. 455; [C. L. C. 59].

nature of a narrative as to how, or by whom, the condition was caused (*n*).

3. Where it is a declaration by a DECEASED PERSON *against his pecuniary or proprietary interest* (*o*). Such declarations need not be made contemporaneously with the facts recorded (*p*) and are evidence not only of such facts as were against the interest of the declarant but of all connected facts to which they refer (*q*). Thus—

(i) A statement by a deceased person that he was illegitimate is admissible as being against both his pecuniary and proprietary interest (*r*).

(ii) An entry by a deceased surgeon of payment of his fees for attending a confinement on a certain date is evidence not only of the receipt of the money, which is a declaration against his pecuniary interest, but also of the date of the child's birth and the names of its parents (*s*).

(iii) An entry in the books of A (deceased) that he has paid a quarter's rent for the premises he occupies is evidence not only that he was a tenant and not owner (this being the declaration against his proprietary interest), but also of the amount and payment of the rent (*t*), and that the person to whom it was paid was the owner (*u*).

4. Where it is a declaration made by a DECEASED PERSON *in the discharge of a duty*, provided that it was made contemporaneously with the facts recorded *and* without any motive to misrepresent, and that it relates only to acts by the declarant (*x*). Such declarations are admissible only to prove acts which it was the

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(*n*) *R.* v. *Nicholas*, 2 C. & K., at p. 248.

(*o*) No interest other than "pecuniary or proprietary" will suffice. Thus it is not sufficient that the declaration is of an act done by the declarant which would expose him to a criminal prosecution and as to which it is in his interest to keep silence (*Sussex Peerage Case*, 11 Cl. & F. 85; 65 R. R. 11).

(*p*) *Doe* v. *Turford*, 3 B. & Ad., at p. 898; 1 L. J. K. B. 262; 37 R. R. 581.

(*q*) *Taylor* v. *Witham*, 3 Ch. D. 605; 45 L. J. Ch. 798; [C. L. C. 160].

(*r*) *Re Perton*, 58 L. T. 706.

(*s*) *Higham* v. *Ridgway*, 10 East, 109; 10 R. R. 235; [C. L. C. 158].

(*t*) *R.* v. *Exeter Guardians*, L. R. 4 Q. B. 341; 38 L. J. M. C. 127.

(*u*) *Peaceable* v. *Watson*, 4 Taunt. 16; 13 R. R. 552; [C. L. C. 162].

(*x*) *The Henry Coxon*, 3 P. D. 156; 47 L. J. Ad. 83; 38 L. T. 819; [C. L. C. 155].

declarant's *duty* both to do and to record, not to prove other facts contained in the declaration (*y*). Thus—

(i) An entry of delivery of beer made in A's books on the evening of the delivery, and signed by a deceased drayman whose duty it was to deliver the beer and sign the entry is admissible to prove the delivery of the beer (*z*).

(ii) The issue is whether A was arrested at a certain place. A certificate of arrest annexed to the writ by a deceased sheriff's officer is relevant to prove the fact and time of the arrest, but not the place, it being no part of the officer's duty to record the place of arrest (*a*).

5. Where it is a statement by a DECEASED PERSON as to a *public or general right or custom or a matter of public or general interest*. Such statements are admissible if made by "a person of the class who would know it" *and* before the commencement of any controversy as to its existence (*b*).

A public right is one common to all members of the State, such as the right to fish in a tidal river: a general right is one common to all members of a class, as, *e.g.*, a right common to all tenants of a manor or inhabitants of a county or parish (*c*). The declaration, to be admissible, must be merely of general *reputation*, *i.e.*, it must refer directly to the existence of the right or custom and not to particular facts from which its existence may be inferred (*d*). It may be oral or may be contained in deeds, maps, surveys, or other documents prepared by competent persons (*e*).

(*y*) *Trotter* v. *Maclean*, 13 Ch. D. 574; 49 L. J. Ch. 256; 42 L. T. 118. A mere *practice* to record the facts is insufficient (*Id.*).

(*z*) *Price* v. *Torrington*, Salk. 285; [C. L. C. 117].

(*a*) *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; 3 L. J. Ex. 373; 40 R. R. 604; [C. L. C. 156].

(*b*) *Sturla* v. *Freccia*, 5 A. C., at p. 641; 50 L. J. Ch. 94; *Weeks* v. *Sparke*, 1 M. & S. 679; 14 R. R. 546; [C. L. C. 173]. Strictly speaking, everyone is *competent* to prove a public right, but unless a witness had some real knowledge of the matter his evidence would have no weight.

(*c*) *Neill* v. *Duke of Devonshire*, 8 A. C. 135; *Lord Dunraven* v. *Llewellyn*, 15 Q. B. 791; 19 L. J. Q. B. 388; 81 R. R. 809; [C. L. C. 176].

(*d*) *R.* v. *Bliss*, 7 A. & E. 550; 7 L. J. Q. B. 4; 45 R. R. 757; [C. L. C. 178] (statement by a deceased declarant that he had planted a tree to mark the boundary of a road held to be inadmissible).

(*e*) See *Plaxton* v. *Dare*, 10 B. & C. 17; 8 L. J. (o.s.) K. B. 98; *Hammond* v. *Bradstreet*, 10 Ex. 390; 23 L. J. Ex. 332; 102 R. R. 644; *Smith* v. *Earl Brownlow*, L. R. 9 Eq. 241; 21 L. T. 739.

6. Where it is a statement by a DECEASED PERSON as to a matter of *pedigree*. Statements by deceased persons are admissible to prove matters of family relationship and history if made by persons legitimately connected with the family by blood or marriage (*f*), *and* before the commencement of any controversy upon the matter (*g*). The declaration need not refer to contemporaneous events or matters within the personal knowledge of a declarant, it may be mere family tradition or hearsay upon hearsay, *i.e.*, it may refer to information derived from general family repute or from other relatives (*h*). It need not be confined to general reputation but may be of particular facts and the dates when they happened (*i*). It may be made in any form, by oral statements, by recitals in deeds or settlements, by entries in family Bibles or genealogies, by inscriptions on tombstones or coffin plates, or even by conduct (*k*).

Declarations of this kind are admissible only in pedigree cases, *i.e.*, when the main issue is a question of descent or relationship. They are not, for example, admissible in an action for goods sold and delivered, in order to prove the infancy of the defendant (*l*).

7. Where it is a declaration by a DECEASED TESTATOR *as to his will*. Such declarations are admissible *only in the following cases* (*m*):—

(i) As secondary evidence of the contents of a lost will (*n*).

(ii) As part of the *res gesta*, when they *accompany* acts done by the testator in relation to the making of the will. Thus, where A wrote out a will in the presence of B

(*f*) *Johnson* v. *Lawson*, 2 Bing. 86; 2 L. J. (o.s.) C. P. 136; 27 R. R. 558; [C. L. C. 170]. Declarations by servants or acquaintances are inadmissible (*Id.*).

(*g*) *Butler* v. *Mountgarret*, 7 H. L. C. 633; 115 R. R. 306; [C. L. C. 167]. The usual expression is *ante litem motam*, which does not mean before the beginning of legal proceedings, but before any dispute.

(*h*) *Doe* v. *Griffin*, 15 East, 293; 13 R. R. 474; [C. L. C. 172]; *Monkton* v. *Att.-Gen.*, 2 Russ. & My. 147; 34 R. R. 38; *Davies* v. *Lowndes*, 6 Man. & G. 471; 12 L. J. C. P. 506; 64 R. R. 783.

(*i*) *Berkeley Peerage Case*, 4 Camp. 401; 14 R. R. 782; [C. L. C. 164].

(*k*) *Id.*, and *Goodright* v. *Moss*, Cowp. 591; [C. L. C. 172].

(*l*) *Haines* v. *Guthrie*, 13 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; [C. L. C. 169].

(*m*) They are not, for example, admissible to prove the execution or revocation of the will (*Atkinson* v. *Morris*, [1897] P. 40; 66 L. J. P. 17; 75 L. T. 440; and see *Keen* v. *Keen* (*infra*)).

(*n*) *Sugden* v. *St. Leonards*, L. R. 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 369; [C. L. C. 185].

and read it aloud to B, and gave him a paper which he said was a copy, it was held that this statement was admissible to prove that the paper contained the terms of the will (*o*).

(iii) When they relate to the existence of any intention or feeling on the part of the testator. Thus, declarations by a testatrix, *both before and after the making of her will*, that she intended to make certain dispositions of her property were admitted to prove that certain papers formed part of the will (*p*). So also declarations by a testator that he had changed his mind and destroyed his will were admitted not as evidence of the destruction but as evidence of the change of intention (*q*).

8. Where it is a statement contained in a *public document*, as, *e.g.*, (i) recitals in public (*r*) (but not private) (*s*) Acts of Parliament and in Royal proclamations (*t*); (ii) the "Gazette," which at Common Law is "an authoritative means of proving" all matters of State and public acts of the Government (*u*); (iii) judicial and quasi judicial inquisitions, records and reports (English or foreign) if made under public legal authority and for a public purpose (*x*); (iv) official registers (English or foreign), provided "that they are kept under the sanction of public authority and are recognised by the tribunals of the country [where they are kept] as public records" (*y*); and, generally (v) any document made under public authority "for the purpose

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(*o*) *Johnson* v. *Lyford*, 1 P. & D. 546; 37 L. J. P. & M. 65.

(*p*) *Gould* v. *Lakes*, 6 P. D. 1; 49 L. J. P. & M. 59.

(*q*) *Keen* v. *Keen*, L. R. 3 P. & D. 105; 42 L. J. P. 61; 29 L. T. 247.

(*r*) *R.* v. *Sutton*, 4 M. & S. 532; [C. L. C. 197].

(*s*) *Brett* v. *Beales*, M. & M. 416; 8 L. J. (o.s.) K. B. 141; 34 R. R. 499; [C. L. C. 199].

(*t*) *R.* v. *Sutton* (*ubi supra*); *Att.-Gen.* v. *Theakstone*, 8 Price, 89; 22 R. R. 716.

(*u*) *R.* v. *Holt*, 5 T. R., at p. 444. By statute also the "Gazette" is evidence of various matters, as, *e.g.*, under s. 137 of the Bankruptcy Act, 1914, by which a copy of the "London Gazette" containing notice of a receiving order or an order adjudging a debtor bankrupt is conclusive evidence of the order having been made and of its date.

(*x*) *Sturla* v. *Freccia*, 5 A. C. 641; 50 L. J. Ch. 86; 43 L. T. 209; [C. L. C. 193]. See also *Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188; 74 L. J. Ch. 599; 92 L. T. 790; 21 T. L. R. 471; *Stoney* v. *Eastbourne Rural Council*, [1921] 1 Ch. 367.

(*y*) *Lyell* v. *Kennedy*, 14 A. C., at p. 488; 59 L. J. Q. B. 268; 62 L. T. 77.

of the public making use of it and being able to refer to it" (*z*). Many registers and certificates are by different statutes made evidence of the facts authorised to be registered and certified, but their discussion is beyond the scope of this chapter (*a*).

9. Where it is a statement made in *previous proceedings*.—Evidence given by a witness in previous proceedings is admissible if the witness is dead, insane, or kept out of the way by the other side (*b*), or is out of the jurisdiction of the Court (*c*), provided that the subsequent proceedings are between the same parties or their privies (*d*), that the same matter is in issue, and that the other party had a right to cross-examine when the evidence was given (*e*).

10. Where it is an *admission*.—In civil cases any statement, oral (*f*) or written (*g*), previously made by a party to the proceedings, is admissible against him unless it was made "without prejudice." But such a statement, unlike an admission expressly made for the purpose of dispensing with proof (*h*), is only *prima facie* evidence and, unless the party is estopped from denying its truth, he may prove that it was untrue or made under a mistake; thus a receipt is only *prima facie* evidence of payment and may be contradicted or explained (*i*).

The admission may be either by the party himself, or by some

(*z*) *Sturla* v. *Freccia* (*ubi supra*). The word "public" is not to be taken "in the sense of meaning the whole world. An entry in the books of a manor is public in the sense that it concerns all the people interested in the manor" (*Id.*, 5 A. C., at p. 644).

(*a*) A full list of public documents, with the method of proving each, is given in Wills' Evidence (Appendix A); this list, with some additions and notes, is also printed in an appendix to Stephen's Digest of Evidence. For *bankers' books*, see *post*, p. 725.

(*b*) *Mayor of Doncaster* v. *Day*, 3 Taunt. 262; 12 R. R. 650; [C. L. C. 189]; *R.* v. *Scarfe*, 17 Q. B., at p. 243; 20 L. J. M. C. 229.

(*c*) *Varicas* v. *French*, 2 C. & K. 100. Also perhaps if he is permanently (*R.* v. *Hogg*, 6 C. & P. 176) but not if he is temporarily (*R.* v. *Savage*, 5 C. P. 143) too ill to travel.

(*d*) *Llanover* v. *Homfray*, 19 Ch. D. 224; [C. L. C. 191]; *Morgan* v. *Nicholl*, L. R. 2 C. P. 117; 36 L. J. C. P. 86; 15 L. T. 184; [C. L. C. 192].

(*e*) *Doe* v. *Tatham*, 1 Ad. & E., at p. 19; *Llanover* v. *Homfray* (*ubi supra*); *Mangena* v. *Wright*, [1909] 2 K. B.; 78 L. J. K. B. 879; 100 L. T. 960; 25 T. L. R. 534.

(*f*) *Maltby* v. *Christie*, 1 Esp. 340; [C. L. C. 134].

(*g*) *Slatterie* v. *Pooley*, 6 M. & W. 664; 10 L. J. Ex. 8; 55 R. R. 760; [C. L. C. 145].

(*h*) *Ante*, p. 692.

(*i*) *Ante*, p. 28.

one through whom he claims (*k*), or by his agent (*l*), or by any person jointly interested with him, as, *e.g.*, a co-executor (*m*). But an admission by an agent is admissible against his principal only when the agent has express or ostensible authority to make it (*n*). Where A refers B to C for information, any information which is in consequence given by C to B is equivalent to an admission by A (*o*). The report of an agent to his own principal is not admissible against the principal (*p*).

An admission may be made by *conduct* as well as by language; for this reason evidence is admissible of statements made to or in the presence and hearing of a person, if in all the circumstances of the case he might reasonably have been expected to make some reply in denial or explanation (*q*). Such statements are not in themselves evidence of the facts stated, but are admissible only as introductory to, or explanatory of, the answer given to them by the person to whom or in whose presence they are made; but the answer may be given either by words or by conduct, *e.g.*, by remaining silent on an occasion which demanded an answer (*r*). But "silence is not evidence of an admission unless there are circumstances which render it more probable that a man would answer the charge made against him than that he would not" (*s*). Thus, if in the course of business negotiations one merchant writes to another a letter

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(*k*) *Woolway* v. *Rowe*, 1 Ad. & E. 114; 3 L J. K. B. 121; 40 R. R. 264; [C. L. C. 144]. But there must be an identity of interest; a tenant cannot therefore, by his statements, prejudice the title of his landlord (*Papendick* v. *Bridgwater*, 5 E. & B. 166; 24 L. J. Q. B. 289; 103 R. R. 411).

(*l*) As to admissions by partners, see s. 15 of the Partnership Act, 1890.

(*m*) *Re Macdonald*, [1897] 2 Ch. 181; 66 L. J. Ch. 630; 76 L. T. 131.

(*n*) *Kirkstall Brewery Co.* v. *Furness Railway Co.*, L. R. 9 Q. B. 648; 43 L. J. Q. B. 142; 30 L. T. 783; [C. L. C. 142]; see *ante*, p. 223. A wife cannot, as such, bind her husband by her admissions, though she may do so as agent; see *Clifford* v. *Burton*, 1 Bing. 199.

(*o*) *Williams* v. *Innes*, 1 Camp. 364; 10 R. R. 702; [C. L. C. 141].

(*p*) *Re Devala Mining Co.*, 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259. And, when an agent has two principals his statements are not evidence for one principal against the other (*Id.*, 22 Ch. D., at p. 596).

(*q*) *Bessela* v. *Stern*, 2 C. P. D. 265; 26 L. J. C. P. 467; 37 L. T. 88; [C. L. C. 135].

(*r*) *R.* v. *Norton*, [1910] 2 K. B., at p. 499; 79 L. J. K. B. 756; 102 L. T. 926; 26 T. L. R. 550.

(*s*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B., at p. 539; 60 L. J. Q. B. 762; [C. L. C. 136].

making a statement which is not denied, the recipient may be taken to have admitted the statement; but, on the other hand, no admission can be implied from the fact that no answer is returned to a letter which charges the recipient with some misconduct (*t*). An admission cannot be given in evidence if it is made *without prejudice*, *i.e.*, for the purpose of effecting a compromise (*u*) and, after one letter written in the course of correspondence has been marked "without prejudice," the whole of the subsequent correspondence is protected (*x*). But the rule applies only to such statements as are made for the purpose of a compromise and not, *e.g.*, to a letter written by a debtor to his creditor stating that he is about to suspend payment of his debts (*y*).

Section 2.—*How proof is effected.*

Evidence may be oral, documentary or real.

Oral Evidence.—All oral evidence must be given either—

1. On *oath* upon the Evangelists or New Testament (or, in the case of Jews, upon the Pentateuch or Old Testament (*z*)), or in the Scotch form (*a*), or in any form which, according to his religion, binds the conscience of the witness (*b*).

(*t*) *Wiedemann* v. *Walpole*, [1891] 2 Q. B., at p. 538. In this case it was held, in an action for breach of promise of marriage, that the mere fact that the defendant did not reply to letters by the plaintiff asserting that he had promised to marry her, did not amount to any admission of the truth of the assertions. The same rule has been recently applied in a bastardy case. See *Thomas* v. *Jones*, [1921] 1 K. B. 22; 90 L. J. K. B. 49; 124 L. T. 179.

(*u*) Nor can they be taken into consideration even to determine whether or not there is any reason for depriving a successful party of his costs (*Walker* v. *Wilsher*, 23 Q. B. D. 335; 58 L. J. Q. B. 501; 5 T. L. R. 649). But it is otherwise if the compromise has been effected so that a complete contract is established (*Id.*).

(*x*) *Paddock* v. *Forrester*, 3 Man. & G. 903; 11 L. J. C. P. 107; 60 R. R. 634; [C. L. C. 46].

(*y*) *Re Daintrey*, [1893] 2 Q. B. 116; 62 L. J. C. P. 107; 60 R. R. Compare *Kitcat* v. *Sharp*, 48 L. T. 64.

(*z*) As to the Common Law, see *Omichund* v. *Barker*, Willes 538; 1 Atkyns, 21; 1 Wilson, 84; [C. L. C. 209]. By the Oaths Act, 1909 (9 Edw. 7, c. 39), a new form of oath was provided, in which a Christian swears upon the New Testament and a Jew upon the Old Testament, by holding it in his uplifted hand without kissing it.

(*a*) Oaths Act, 1888 (51 & 52 Vict. c. 46), s. 5.

(*b*) Oaths Act, 1838 (1 & 2 Vict. c. 105).

2. On *affirmation*, which is permissible only where the witness objects to take an oath, either (i) because he has no religious belief, or (ii) because the taking of oaths is contrary to his religious belief (*c*). If a witness desires to affirm, it is the duty of the Judge to ascertain that his objection is based upon one of these grounds, no other ground of objection permitting affirmation instead of an oath (*d*). If an oath has been duly administered and taken, the fact that the witness had no religious belief does not effect the validity of the oath (*e*).

Competency of Witnesses.—In civil cases all persons are competent to give evidence, unless, in the opinion of the Judge, they are, through infancy, drunkenness, or lunacy, unable to understand the nature of an oath and the duty of speaking the truth, or to give rational evidence (*f*). There is no fixed age under

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(*c*) Oaths Act, 1888, s. 1. See also s. 15 (1) of the Perjury Act, 1911 (1 & 2 Geo. 5, c. 6).

(*d*) *R.* v. *Moore*, 61 L. J. M. C. 80; 66 L. T. 125.

(*e*) Oaths Act, 1888, s. 3.

(*f*) A person who had been convicted of certain crimes, or who had any interest in the proceedings, was formerly incompetent to give evidence. The principal statutes by which these incapacities were removed are: (i) the Evidence Act, 1843, which abolished incapacity from crime or interest, except, in the latter case, as to the parties, and their husbands and wives, who were still precluded from giving evidence; (ii) the Evidence Act, 1851, which allowed the parties to an action and the persons on whose behalf it was instituted to give evidence, except in proceedings instituted in consequence of adultery or an action for breach of promise of marriage; (iii) the Evidence Amendment Act, 1853, which allowed the husbands and wives of the parties, etc., to give evidence, but provided that husbands and wives should not be competent to give evidence against each other in any proceeding instituted in consequence of adultery; (iv) the Evidence Further Amendment Act, 1869, which allowed the parties to an action for breach of promise of marriage and the parties to any proceedings instituted in consequence of adultery, and the husbands and wives of such parties, to give evidence in any such action or proceeding. By s. 3 of this Act, it was, however, provided "that no witness to a proceeding, whether a party or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceedings in disproof of his or her alleged adultery," *i.e.*, of the adultery in issue in the proceedings (*Hale* v. *Hale*, 25 T. L. R. 524). By the Supreme Court of Judicature (Consolidation) Act, 1925, the last section is repealed *so far as it relates to the High Court*, and by s. 198 it is provided that the parties to any proceedings instituted in consequence of adultery and the husbands and wives of such parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

which infants are excluded from giving evidence, their competency depending not upon their age, but upon their understanding and intelligence (*g*). A person who suffers from partial delusions is not incompetent to give evidence upon matters unconnected with his delusions, but if his evidence appears tainted with insanity the jury may disregard it (*h*).

Examination of Witnesses.—Examination in chief must be confined to matters in issue and directly relevant to the issue. In examination in chief and re-examination *leading questions* are not as a rule permitted, *i.e.*, questions so framed as to indicate to the witness what answer is required. Leading questions are, however, usually permitted (i) in matters which are undisputed or merely introductory (*i*); (ii) to identify persons or things; (iii) to obtain a direct contradiction of a fact stated by another witness; (iv) where the question from its nature cannot be put otherwise than in a leading form.

Refreshing the memory.—Although a witness must speak only of matters within his own knowledge and recollection, he may refresh his memory by reference to any memorandum, if (i) made at or about the time of the fact to which it refers, and (ii) either made by himself or seen by him when the facts were fresh in his mind and then recognised to be correct (*k*). The opposite party may see any such memorandum and cross-examine upon such parts as are referred to without making them evidence against him, but if he cross-examines upon other parts, they become evidence against him (*l*).

Cross-examination.—The object of cross-examination is (i) to obtain from the witness admissions as to any part of the case of the cross-examining party, (ii) to diminish the weight of the

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(*g*) *R.* v. *Brasier*, 1 Leach C. C. 199; [C. L. C. 207].

(*h*) *R.* v. *Hill*, 20 L. J. M. C. 222; 2 Den. C. C. 254; 90 R. R. 822; [C. L. C. 208]

(*i*) See *Nicholls* v. *Dowding & Kemp*, 1 Stark. 81; 18 R. R. 746; [C. L. C. 212].

(*k*) *Maugham* v. *Hubbard*, 8 B. & C. 14; 6 L. J. (o.s.) K. B. 229; 32 R. R. 328; [C. L. C. 213]; *Burrough* v. *Martin*, 2 Camp. 112; 11 R. R. 679; [C. L. C. 214]. An *expert* witness may refer to books published by others in order to refresh his memory or correct his opinion. See the *Sussex Peerage Case*, 11 Cl. & Fin., at p. 117; 65 R. R. 11.

(*l*) *Gregory* v. *Tavernor*, 6 C. & P. 280.

evidence given by the witness by showing that it is inaccurate, improbable or contradictory, or that he himself is not worthy of belief.

As a general rule a witness should be cross-examined upon any part of his evidence which is intended to be disputed, the failure to cross-examine being usually considered as an acceptance of the evidence (*m*). Any fact which a defendant intends to prove as part of his case should also be put to such witnesses of the plaintiff as it affects, in order to give them an opportunity of denying. But where a plaintiff has failed to adduce the evidence requisite to support his own case, care should be taken to avoid unnecessary cross-examination which may enable him to adduce it. Care is also necessary to avoid incautious cross-examination which may let in evidence of matters not admissible in the first instance, as, *e.g.*, of parts of a memorandum which have not been referred to by a witness, or of a conversation which would have otherwise been excluded. Leading questions are permissible in cross-examination (*n*).

Cross-examination is not limited to matters in issue or directly relevant to the issue, but may extend to any matter which affects the credibility of the witness, who may accordingly be asked any question which—

1. Tests his means of knowledge and reasons for recollection or powers of memory and judgment; or

2. Impeaches his credit by showing—

(i) His interest, bias, or partiality (*o*);

(ii) That he has on other occasions made statements inconsistent with his present testimony (*p*);

(iii) That he is of bad general reputation or that he has at any time been convicted of any felony or misdemeanour (*q*).

Re-examination.—After a witness has been cross-examined he may be re-examined in order to explain any answers given by

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(*m*) See the *Queen's Case*, 2 B. & B., at p. 313; 22 R. R. 662.
(*n*) *Parkin* v. *Moon*, 7 C. & P. 408; [C. L. C. 218].
(*o*) *Thomas* v. *David*, 7 C. & P. 350; 48 R. R. 794; [C. L. C. 232].
(*p*) Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 5. This Act applies to civil as well as criminal Courts.
(*q*) Criminal Procedure Act, 1865, s. 6.

him in cross-examination. "I think the counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further and to introduce *new matters* not suited to the purpose of explaining either the expressions or the motives of the witness" (*r*). Thus a witness who has been cross-examined as to some part of a conversation may be re-examined as to all connected parts of such conversation in order to explain his answers on cross-examination, but not as to unconnected statements made at the same time (*s*). Leading questions are not permitted in re-examination.

Privilege of witnesses.

1. *Incriminating questions.*—No witness can be compelled to answer any question or produce any document which he swears will tend to expose him to any criminal charge, penalty, or forfeiture (*t*). To entitle a witness to this "privilege of silence, the Court must see from the circumstances of the case and the nature of the evidence which the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer"; if, however, "the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question"; but "the danger to be apprehended must be real and appreciable" (*u*). If a witness, after claiming privilege, is improperly compelled to answer, his answer cannot,

(*r*) *The Queen's Case*, 2 B. & B., at p. 297; 22 R. R. 662; cited in *Prince* v. *Samo*, 7 A. & E. 630; 7 L. J. Q. B. 123; 45 R. R. 783; [C. L. C. 222].

(*s*) *The Queen's Case*, 2 B & B., at p. 297, cited in *Prince* v. *Samo* (*ubi supra*).

(*t*) *R.* v. *Boyes*, 1 B. & S. 311; 30 L. J. Q. B. 301; 5 L. T. 147; 124 R. R. 571; [C. L. C. 235]; *Pye* v. *Butterfield*, 5 B. & S. 829; 34 L. J. Q. B. 17; 136 R. R. 771; [C. L .C. 237]. See also the Evidence Act, 1851, s. 3. By the Witnesses Act, 1806 (46 Geo. 3, c. 37), it is expressly provided that a witness cannot refuse to answer merely on the ground that his answer would show that he owed a debt or would expose him to a civil action.

(*u*) *R.* v. *Boyes*, 1 B. & S., at p. 330; 124 R. R. 571; approved in *Ex p. Reynolds*, 20 Ch. D. 294; 51 L. J. Ch. 766; 46 L. T. 508.

on a subsequent trial for the criminal offence, be given in evidence against him (*x*). By some statutes, however, it is provided that a witness cannot refuse to answer questions as to certain matters on the ground that they would criminate him, but that his answers shall not be admissible against him in criminal proceedings arising out of the same (*y*).

It may also be noted here (i) that a *party* to an action cannot be compelled to produce documents which he swears relate solely to his own title and case and do not in any way tend to prove or to support the title of the plaintiff (*z*); and (ii) that a person who is *not a party* to the action cannot be compelled to produce his title deeds or other documents referring to his title to property (*a*).

2. *Communications between husband and wife.*—" No husband shall be compellable to disclose any communication made to him by his wife during the marriage and no wife shall be compellable to disclose any communication made to her by her husband during the marriage " (*b*).

3. *Questions tending to show that the witness has committed adultery.*—Such questions, *in certain cases* (*c*), a witness may not be asked nor compelled to answer.

4. *Legal professional privilege.*—This privilege protects from disclosure documents and communications of two kinds (*d*):—

(i) Confidential communications between a party and his legal adviser, whether made directly or through an agent for either party. The privilege in this case exists whether or not any litigation is pending (*e*).

(ii) Confidential communications made or documents called into existence for the purpose of providing or obtaining

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(*x*) *R.* v. *Garbett*, 2 C. & K. 474.

(*y*) See *e.g.*, s. 166 of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), and s. 43 of the Larceny Act, 1916 (6 & 7 Geo. 5, c. 50).

(*z*) *Morris* v. *Edwards*, 15 A. C. 309; 60 L. J. Q. B. 292; 63 L. T. 26; [C. L. C. 246].

(*a*) *Pickering* v. *Noyes*, 1 B. & C. 262; 1 L. J. K. B. 110; 28 R. R. 430; [C. L. C. 247].

(*b*) Evidence Amendment Act, 1853 (16 & 17 Vict. c. 83), s. 3; see *ante*, p. 714, n. (*f*).

(*c*) *Ante.*

(*d*) *Anderson* v. *Bank of British Columbia*, 2 Ch. D., at p. 658; 45 L. J. Ch. 449.

(*e*) *Ibid.*, and see *Wheeler* v. *Le Marchant*, 17 Ch. D. 675; 50 L. J. Ch. 793; 44 L. T. 632; [C. L. C. 238].

information, advice, or legal assistance *with reference to existing or contemplated litigation* (*f*). In this case the privilege is not limited to communications between a party and his legal adviser, but extends to communications between the legal adviser or the party and a third person (*g*), or to documents made by a third person, even though such third person was an ordinary agent for the party, provided that, in each case, they were made for the purposes of the litigation (*h*).

The privilege does not extend to everything learnt by a legal adviser in the course of his dealing with his client, but only to confidential communications made for the purpose of obtaining his advice (*i*). Thus a solicitor may be compelled to disclose collateral matters which have incidentally come to his knowledge, such as his client's address (*k*), or name (*l*), or matters which occurred at the execution of a deed which he attested (*m*). Nor does the privilege extend to communications made *in furtherance of* any criminal or fraudulent purpose (*n*). Lastly, it extends only to legal advisers, including their clerks; it does not apply to communications to or from medical advisers or clergymen (*o*).

Contradicting witnesses.

1. A party may not discredit his own witness by giving general evidence of his bad character, but he may contradict him by other

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(*f*) 17 Ch. D., at pp. 681, 685.

(*g*) *McCorquodale* v. *Bell*, 1 C. P. D. 471; 45 L. J. C. P. 329.

(*h*) *Anderson* v. *Bank of British Columbia* (*ubi supra*); *Southwark Water Co.* v. *Quick*, 3 Q. B. D. 315; 47 L. J. Q. B. 258; *Learoyd* v. *Halifax, etc., Co.*, [1893] 1 Ch. 686; 62 L. J. Ch. 509; 68 L. T. 158; *Jones* v. *Great Central Railway Co.*, [1910] A. C. 4; 79 L. J. K. B. 191; 100 L. T. 710. Even anonymous letters written to a party's counsel or solicitor are privileged, though not those written to the party himself (*Re Holloway*, 12 P. D. 167; 56 L. J. P. 81; 57 L. T. 515).

(*i*) *Wheeler* v. *Le Marchant* (*ubi supra*); *Bursill* v. *Tanner*, 16 Q. B. D., at p. 5; 55 L. J. Q. B. 53; 53 L. T. 455.

(*k*) *Ex p. Campbell*, 5 Ch. 703; 23 L. T. 289.

(*l*) *Bursill* v. *Tanner* (*ubi supra*). Nor can a solicitor refuse to produce a document belonging to his client if the client himself could not do so (*ibid.*).

(*m*) *Crawcour* v. *Salter*, 18 Ch. D., at p. 36; 45 L. T. 62.

(*n*) *R.* v. *Cox and Railton*, 14 Q. B. D. 153; 54 L. J. M. C. 41; 52 L. T. 25; [C. L. C. 242]; *O'Rourke* v. *Darbishire*, [1920] A. C. 581; 89 L. J. Ch. 162; 123 L. T. 68; 36 T. L. R. 350.

(*o*) *Wheeler* v. *Le Marchant* (*ubi supra*).

evidence relevant to the issue (*p*), and, if the witness is, in the opinion of the Judge, adverse, he may, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony, but before such last-mentioned proof can be given the circumstances of the statement must be mentioned to the witness and he must be asked whether or no he made it (*q*).

2. An opposing witness may be contradicted by independent evidence on all matters directly relevant to the issue. But on matters which are relevant only as affecting his credit a witness may not be contradicted or discredited by independent evidence (*r*), except—

(i) Where he denies having previously made a statement inconsistent with his present evidence. Before proof of such a statement can be given, the circumstances under which it was made must be mentioned to the witness, and he must be asked whether he did make it (*s*). If the previous statement was in writing, and it is intended to contradict him by the writing, his attention must before such contradictory proof is given, be called to the parts of the writing which are to be used for the purpose of contradicting him (*t*).

(ii) Where he denies interest, bias, or partiality (*u*).

(iii) Where he denies a conviction for felony or misdemeanour (*x*).

Corroboration.—By the *Evidence* (*Further Amendment*) *Act*, 1869 (*y*), it is provided that "no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her

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(*p*) *Ewer* v. *Ambrose*, 3 B. & C. 746; 3 L. J. (o.s.) K. B. 128; 28 R. R. 198; [C. L. C. 224]. That is to say, if one witness gives evidence contrary to what is expected, the party calling him is not precluded from proving his case by other witnesses.

(*q*) Criminal Procedure Act, 1865 (28 Vict. c. 18), s. 3. The word "adverse" means that the witness is hostile, not merely that he gives unfavourable evidence (*Greenough* v. *Eccles*, 5 C. B. (N.S.) 786; 28 L. J. C. P. 160; [C. L. C. 231]).

(*r*) *Harris* v. *Tippett*, 2 Camp. 637; 12 R. R. 767; [C. L. C. 225].

(*s*) Criminal Procedure Act, 1865, s. 4.

(*t*) *Id.*, s. 5.

(*u*) *Thomas* v. *David*, 7 C. & P. 350; 48 R. R. 794; [C. L. C. 232].

(*x*) Criminal Procedure Act, 1865, s. 6.

(*y*) 32 & 33 Vict. c. 68, s. 2 (see *ante*, p. 714, n. (*f*)).

testimony shall be corroborated by some other material evidence in support of such promise."

Claims against the estate of a deceased person do not as a matter of *law* require corroboration, though uncorroborated evidence by the claimant will be looked at with great care (*z*).

Real Evidence.

Where the identity, appearance or condition of any physical object is in issue, it may be produced to the Court for its inspection: so also the Judge may, at any time during the trial, inspect or allow the jury to view any property (*a*). The adduction of such real evidence is never necessary, though failure to adduce it may in some circumstances affect the weight of the other evidence (*b*). A case may not be decided upon real evidence alone: thus where a Judge simply viewed two objects and came to a decision upon his eyesight alone, it was held by the Court of Appeal that he ought not to have decided without hearing independent evidence (*c*).

Documentary Evidence.

Authentication of documents.—*Public* documents, as a rule, require no authentication. Proof of the execution of a *private* document may be dispensed with by an admission made by the adversary upon a *notice to admit*, under *Order XXXII, r.* 2. By this rule it is provided that either party may call upon the other party to admit any document, saving all just exceptions, and, in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the trial the Judge certifies that the refusal was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give

(*z*) *Re Garnett*, 31 Ch. D., at p. 9; *Re Hodgson*, 31 Ch. D. 177; 55 L. J. Ch. 241; 54 L. T. 222; [C. L. C. 124].

(*a*) Rules of the Supreme Court, Order 50, rr. 3-5, and County Court Rules, Order XII, rr. 3 and 4.

(*b*) *R.* v. *Francis*, L. R. 2 C. C. R. 128; 43 L. J. M. C. 97; 30 L. T. 503; [C L. C. 305].

(*c*) *London General Omnibus Co.* v. *Lavell*, [1901] 1 Ch. 135; 70 L. J. Ch. 17.

notice is, in the opinion of the taxing master, a saving of expense. An admission under this rule, "saving all just exceptions," merely admits the execution of the document, and not its validity or admissibility.

In the absence of any admission under the foregoing rule, a private document which is less than thirty years old and which is *required by law to be attested* must, as a general rule, be proved by at least one attesting witness; but if all the attesting witnesses are dead or out of the jurisdiction of the Court, or any other satisfactory reason is given for not procuring their attendance, the instrument may be proved by evidence of the handwriting of one of them (*d*). And an attesting witness need not be called when the document is in the possession of the adversary, who refuses to produce it if after proper notice to produce (*e*), or who, though he produces it, claims an interest under it (*f*). If an attesting witness sees his signature and says that he is therefore sure that he saw the party execute the deed, that is sufficient proof of its execution, although he does not recollect the fact of its execution (*g*).

Private documents which are *not required by law to be attested* must be authenticated by proof of the handwriting and signatures, and, in case of deeds, of the sealing and delivery (*h*).

Handwriting may be proved (1) by the writer; (2) by anyone who saw the document written; (3) by anyone who has seen the party write on any other occasion (*i*); (4) by anyone who has had any opportunity of becoming acquainted with the handwriting of the party through correspondence with him or through seeing documents written by him (*k*); (5) by comparision with genuine

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(*d*) *Nelson* v. *Whittall*, 1 B. & Ald. 19; *Baxendale* v. *De Valmer*, 57 L. T. 556. Proof of wills is subject to special rules which are outside the scope of this book.

(*e*) *Cooke* v. *Tanswell*, 8 Taunt. 450.

(*f*) *Pearce* v. *Hooper*, 3 Taunt. 60; [C. L. C. 280].

(*g*) *Maugham* v. *Hubbard*, 8 B. & C. 14; 6 L. J. K. B. 229; 32 R. R. 328; [C. L. C. 213].

(*h*) A document which, though in fact attested, does not require attestation, may be proved as if it had not been attested (Criminal Procedure Act, 1865, s 7; applying both to criminal and civil Courts, s. 1).

(*i*) To have seen him write even once is sufficient knowledge to render the evidence of the witness *admissible*, however, little *weight* may be attached to such evidence (*Doe* v. *Suckermore*, 5 Ad. & E. 703; 7 L. J. K. B. 33; 44 R. R. 533).

(*k*) *Doe* v. *Suckermore* (*ubi supra*); *R.* v. *Slaney*, 5 C. & P. 213; 38 R. R. 805.

documents: "Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute" (*l*). The witness must have some skill in comparing handwriting, but need not be a professional expert (*m*).

Presumptions as to documents—

1. A document purporting to be a deed, if signed and attested, is presumed to have been duly sealed and delivered (*n*).

2. Documents are presumed to have been executed on the day they bear date and (if more than one) in the proper order for effecting their purpose (*o*).

3. A document thirty years old which is produced from proper custody is presumed to be valid, and no proof is required in the first instance of the writing, signature, and attestation (*p*).

4. Alterations in a will are presumed to have been made after execution, alterations in a deed before execution (*q*).

Contents of documents.—The contents of documents must, as a rule, be proved by *primary* evidence, that is, by the production of the document itself; all evidence in substitution for the document, whether a copy or verbal evidence of its contents is *secondary*, and, except when made admissible by statute, may not be given until the absence of the document has been accounted for; the law does not permit a man to give evidence

(*l*) Criminal Procedure Act, 1865, s. 8.

(*m*) *R.* v. *Silverlock*, [1894] 2 Q. B. 766; 63 L. J. M. C. 233. He must have an adequate knowledge, though he need not have gained it in the way of his business. After, however, it has been determined that his evidence is admissible, its *weight* or value is a question for the jury (*Id.*, at p. 771).

(*n*) *Hall* v. *Bainbridge*, 12 Q. B. 699; 17 L. J. Q. B. 317; *Re Sandilands*, L. R. 6 C. P. 411; (S. C. *nom. Mayer, Re*), 40 L. J. C. P. 201; [C. L. C. 275].

(*o*) *Anderson* v. *Weston*, 6 Bing. N. C. 296; 9 L. J. C. P. 194; 54 R. R. 795; [C. L. C. 277].

(*p*) Proper custody means custody in which it might reasonably and naturally be expected to be found (*Meath* v. *Winchester*, 3 Bing. N. C. 183; 42 R. R. 38; [C. L. C. 278].

(*q*) *Doe* v. *Catomore*, 16 Q. B. 745; 20 L. J. Q. B. 364; 83 R. R. 714; [C. L. C. 281].

which from its very nature shows that there is better evidence in existence (*r*). There are no degrees of secondary evidence, and hence if any secondary evidence is admissible all kinds are equally admissible though they may differ in weight (*s*).

Secondary evidence is **admissible** in the following cases:—

1. Where the original is destroyed, or cannot be found after reasonable search (*t*), or cannot conveniently be produced in Court, as in the case of inscriptions on walls or tombstones (*u*).

2. Where the original is in the hands of the opposite party, who does not produce it, provided that he has been given proper notice to produce it or that notice to produce is unnecessary (*x*).

3. Where the original is in the possession of a third person who is out of the jurisdiction and refuses to produce it, or being within the jurisdiction has been served with a *subpœna duces tecum* and justifiably refuses to produce it on the ground of privilege (*y*).

4. Where the original is a *public or official document* of which some particular kind of secondary evidence is permitted by statute or rule of Court (*z*).

(*r*) *Macdonnell* v. *Evans*, 11 C. B. 930; 21 L. J. C. P. 141; 87 R. R. 818; [C. L. C. 253].

(*s*) *Doe* v. *Ross*, 7 M. & W. 102; 10 L. J. Ex. 201; 56 R. R. 639; [C. L. C. 269]. This does not apply to any public documents with regard to which some particular kind of secondary evidence is by statute admissible in order to avoid the necessity of producing the original (*infra*).

(*t*) *Brewster* v. *Sewell*, 3 B. & Ald. 296; 22 R. R. 395; [C. L. C. 264]; *Read* v. *Price*, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 100 L. T. 60; 25 T. L. R. 701.

(*u*) *Mortimer* v. *M'Callan*, 6 M. & W. 58; 9 L. J. Ex. 73; 55 R. R. 503; [C. L. C. 266]; *Owner* v. *Beehive, etc., Co.*, [1914] 1 K. B. 105; 83 L. J. K. B. 282; 109 L. T. 800; 30 T. L. R. 21.

(*x*) *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J. Ex. 225; 86 R. R. 770, [C. L. C. 260]. Notice to produce is unnecessary (i) where the opponent or his solicitor has the document in Court (*Dwyer* v. *Collins*, *ubi supra*); (ii) where the parties hold duplicate originals, each of which is then primary evidence; (iii) where the document is a notice (*e.g.*, a notice to quit); (iv) where from the nature of the suit the opposite party must know that he is charged with possession of the document (*e.g.*, in an action to recover the document). For (ii) (iii) and (iv) see *Colling* v. *Treweek*, 6 B. C., at pp. 398, 399; 5 L. J. (o.s.) K. B. 132; 30 R. R. 366.

(*y*) If the refusal is wrongful secondary evidence is not admissible (*R.* v. *Llanfaethly*, 23 L. J. M. C. 33; 2 E. & B. 940; 95 R. R. 915; [C. L. C. 263].

(*z*) A list of public documents with the method of proving each is given in an Appendix to Wills on Evidence. (See also Powell's Evidence, by Dr. Blake Odgers, Book II., Chapter VI.).

By s. 4 of the *Evidence Act*, 1851 (*a*), it is provided that wherever any book or document is of such a public character as to be admissible in evidence upon its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, its contents may be proved by an *examined copy*, *i.e.*, a copy produced by a witness who swears that he has examined it with the original, or by a *certified copy*, *i.e.*, a copy signed and certified by an officer who has charge of the original.

Judicial records in the Supreme Court may be proved by an examined copy or by an *office copy* (*b*), *i.e.*, a copy made in the office of the High Court of Justice by an officer having charge of the original.

By the *Bankers' Books Evidence Act*, 1879, it is provided that a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry, and of the matters, transactions and accounts therein recorded, provided that it is proved, orally or on affidavit, by a partner or officer of the bank (i) that the book was, at the time of the entry, one of the ordinary books of the bank; and (ii) that the entry was made in the usual and ordinary course of business; and (iii) that the book is in the custody or control of the bank (*c*). The copy must be an *examined copy*, proved orally or on affidavit by some person who has examined it with the original entry (*d*).

A banker or officer of a bank is not, in any legal proceedings to which the bank is *not* a party, compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters therein recorded, unless by order of a Judge made for special cause (*e*).

On the application of any party to a legal proceeding a Court or Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings (*f*).

(*a*) 14 & 15 Vict. c. 99.
(*b*) R. S. C., Order XXXVII., r. 4.
(*c*) 42 Vict. c. 11, ss. 3 and 4.
(*d*) *Id.*, s. 5.
(*e*) *Id.*, s. 6.
(*f*) *Id.*, s. 7. The order may be made *ex parte* (*ibid.*), but great caution should be used in exercising this power (*Arnott* v. *Hayes*, 36 Ch. D., at

Oral Evidence Respecting Written Contracts.—"If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made or during the time that it was in a state of preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract" (*g*).

But oral evidence is admissible for the following purposes:—

1. To prove the existence, as distinct from the terms, of the contract. Thus, though there is a written agreement between landlord and tenant, the fact of the tenancy may be proved by oral evidence (*h*).

2. To identify the documents which contain the contract (*i*), provided that, where the contract is one for which written evidence is required, the documents contain some reference to each other (*k*).

3. To show that a document was not intended to contain the terms of the contract—*e.g.*, that it was intended merely as a receipt (*l*).

4. To prove that the document is not the whole contract or that there was some written or oral collateral contract in consideration of which the contract in the document was made,

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p. 738; 56 L. J. Ch. 844; 57 L. T 299). The section gives power to order inspection of the accounts of persons who are not parties to the proceedings if they would be admissible in evidence at the trial (*Howard* v. *Beale*, 23 Q. B. D. 1; 58 L. J. Q. B. 384; 60 L. T. 637); but this power also must be exercised with great caution (*Pollock* v. *Garle*, [1898] 1 Ch. 1; 66 L. J. Ch. 788; 77 L. T. 415). The section does not alter the principles of law or the practice with regard to discovery, or take away any existing ground of privilege, and accordingly inspection will not be ordered where the person against whom inspection is sought, being a party to the action, objects that the entries tend to incriminate him (*Waterhouse* v. *Barker*, [1924] 2 K. B. 759; 93 L. J. K. B. 897; 40 T. L. R. 805).

(*g*) *Goss* v. *Lord Nugent*, 5 B. & Ad., at p. 64; 2 L. J. K. B. 127; 39 R. R. 392; [C. L. C. 192].

(*h*) See *R* v. *Holy Trinity, Hull*, 7 B. & C. 611; 6 L. J. M. C. 24; 31 R. R. 267; [C. L. C. 256].

(*i*) *Edwards* v. *Aberayron Mutual, &c., Society*, 1 Q. B. D., at p. 588; 34 L. T. 457.

(*k*) *Ante*, p. 76.

(*l*) *Allen* v. *Pink*, 4 M. & W. 140; 2 L. J. Ex. 206; 51 R. R. 503; [C. L. C. 284]. See also *Jervis* v. *Berridge*, 8 Ch. 351; 42 L. J. Ch. 518; 28 L. T. 481.

provided that if such collateral contract is oral, it is not inconsistent with the terms of the document (*m*).

5. To prove terms implied by custom, not being inconsistent with the written contract (*n*).

6. To prove that the writing is not yet a contract—*i.e.*, that there was a collateral oral agreement by which the happening or performance of some event or act was a condition precedent to the existence of the contract; as, *e.g.*, an oral agreement that the contract should not be operative until approved by a third party (*o*).

7. To show that the writing is no longer a contract—*i.e.*, that there has been an oral rescission, which is possible even where the contract itself must be evidenced in writing (*p*).

8. To prove subsequent variations, unless the contract is one of which evidence in writing is necessary (*q*).

9. To prove the invalidity of the contract by reason of fraud, mistake or any other matter rendering it voidable or void (*r*).

(*m*) *Morgan* v. *Griffith*, L. R. 6 Ex. 70; 40 L. J. Ex. 46; 23 L. T. 783; [C. L. C. 287]; *Angell* v. *Duke*, 32 L. T. 320; [C. L. C. 389]; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215; 70 L. J. K. B. 533; 84 L. T. 549; *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A. C. 30; 82 L. J. K. B. 245; 107 L. T. 769; *Jacobs* v. *Batavia, etc., Trust, Ltd.*, [1924] 1 Ch. 329; 93 L. J. Ch. 520; 131 L. T. 617; 40 T. L. R. 616.

(*n*) *Wigglesworth* v. *Dallison*, Dougl. 201; [C. L. C. 293]; *Brown* v. *Byrne*, 3 E. & B. 703; 23 L. J. Q. B. 313; 97 R. R. 715; [C. L. C. 294]; *Robinson* v. *Mollett*, L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544.

(*o*) *Pym* v. *Campbell*, 6 E. & B. 370; 25 L. J. Q. B. 277; 27 L. T. 122; 106 R. R. 632. See also *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; 66 L. J. Ch. 144; 75 L. T. 475.

(*p*) *Goss* v. *Nugent* (*ubi supra*). And this is so although the verbal rescission is by a contract which is unenforceable for lack of written evidence. Thus, in the case of *Morris* v. *Barron & Co.*, [1918] A. C. 1; 87 L. J. K. B. 145; 118 L. T. 34, it was held that a contract for the sale of goods of more than £10 in value, evidenced by writing as necessary under s. 4 of the Sale of Goods Act, 1893, was rescinded by a subsequent verbal contract for the sale of goods, which, through absence of written evidence, was not itself enforceable by action. But this principle applies only where there is a clear intent to rescind, and not merely to vary, the original contract (*id.*). See also *British & Bennington's, Ltd.* v. *N. W. Cachar, etc., Co.*, [1923] A. C. 48; 92 L. J. K. B. 162; 128 L. T. 422.

(*q*) *Goss* v. *Nugent* (*ubi supra*); *Morris* v. *Barron & Co.* (*ubi supra*). As to specific performance where there has been a part performance of the variations, see *Price* v. *Dyer*, 17 Ves., at p. 264; 11 R. R. 102.

(*r*) *Dobell* v. *Stevens*, 3 B. & C. 623; 3 L. J. K. B. 89; 27 R. R. 441; [C. L. C. 285].

10. To explain the nature of the transaction or the relationship of the parties (*s*) and the circumstances of the case so as to enable the document to be construed in its application to that transaction or those circumstances (*t*).

11. To construe and interpret in any other way the language of the written contract. As to this, the following rule was laid down in the case of *Shore* v. *Wilson* (*u*): "The general rule I take to be that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties, is utterly inadmissible . . . [but] . . . where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be

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(*s*) As, *e.g.*, to show that a person signed as agent (*Humble* v. *Hunter*, 12 Q. B., at p. 316—such evidence cannot, however, be given where the agent contracted as *principal*, for it would then contradict the writing (*ibid.*); or to show that indorsees of a bill of exchange signed as co-sureties and were therefore liable jointly and not successively (*Macdonald* v. *Whitfield*, 8 A. C. 733; 52 L. J. P. C. 70; 49 L. T. 446). See also *McDonald & Co.* v. *Nash*, [1924] A. C. 625; 93 L. J. K. B. 610; 40 T. L. R. 530; *Elliott* v. *Bax-Ironside*, [1925] 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631. See also *ante*, p. 414.

(*t*) "It is the duty of the Court to construe a contract with the aid of the surrounding circumstances found by the jury or other tribunal whose function it is to find the facts" (*Comptoir Commercial Anversois* v. *Power & Co.*, [1920] 1 K. B., at p. 883; 89 L. J. K. B. 849; 122 L. T. 567; 36 T. L. R. 101). And the surrounding circumstances may be looked at not only "for the purpose of making intelligible the terms of the deed and of applying them to the facts," but "for the purpose of implying in the deed a covenant which was not expressed therein." "No doubt surrounding circumstances may not be used for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to agree; but if a Judge or an arbitrator, knowing the terms of the deed and the circumstances surrounding its execution, is satisfied by those means that the parties intended by that instrument to agree to terms which, though not clearly expressed, are in his belief to be implied in it, there is no reason why he should not give effect to his opinion" (*Kelantan Government* v. *Duff Development Co.*, [1923] A. C., at p. 412; 92 L. J. Ch. 307; 129 L. T. 356; 39 T. L. R. 337).

(*u*) 9 Cl. & Fin. 355.

investigated and ascertained by evidence *dehors* the instrument itself. . . . Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments; in cases where terms of art or science occur; in mercantile contracts, which in many instances are in a peculiar language employed by those who are conversant in trade and commerce (*x*), and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known, peculiar, idiomatic meaning, in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member and in which he passed his life " (*y*).

Oral evidence may be given to explain not only a *latent* ambiguity (*i.e.*, one which does not appear from the words of the document itself), but also a *patent* (*z*) ambiguity (*i.e.*, one appearing on the face of the document) unless, in the latter case, the words are so defective or ambiguous as to be wholly unmeaning (*a*).

(*x*) See, *e.g.*, *Bowes* v. *Shand*, 2 A .C. 455; 46 L. J. Q. B. 561; 36 L. T. 857.

(*y*) See, *e.g.*, *Smith* v. *Wilson*, 3 B. & Ad. 728; 1 L. J. K. B. 194; 37 R. R. 536; [C. L. C. 301], where evidence was admitted to prove that by local custom 100 rabbits meant six score.

(*z*) *Colpoys* v. *Colpoys*, Jacob, 451; 53 R. R. 42; [C. L. C. 298]. See also *Summers* v. *Moorehouse*, 13 Q. B. D. 388; 53 L. J. Q. B. 564; 51 L. T. 290.

(*a*) *Baylis* v. *Att.-Gen.*, 2 Atkyns, 239; [C. L. C. 301].

APPENDIX.

THE IRISH FREE STATE (CONSEQUENTIAL ADAPTATION OF ENACTMENTS) ORDER, 1923 (*a*).

2. Subject to the provisions of this Order and of any subsequent Order in Council made under s. 6 of the Irish Free State (Consequential Provisions) Act, 1922, references in any enactment passed before the establishment of the Irish Free State to " the United Kingdom " or " the United Kingdom of Great Britain and Ireland," or " Great Britain and Ireland," or " Great Britain or Ireland," or " the British Islands " or " Ireland " shall, in the application of the enactment to any part of Great Britain and Ireland other than the Irish Free State, be construed as exclusive of the Irish Free State, except that in the Acts mentioned in the Schedule to this Order any such expression as aforesaid shall, to the extent specified in that Schedule, be construed as including the Irish Free State (*b*).

Provided that, etc. (*the remaining provisions of this paragraph are not material*).

3. Subject as aforesaid, references to " the United Kingdom," or " the United Kingdom of Great Britain and Ireland," or " Great Britain and Ireland " or " Great Britain or Ireland," or " the British Islands " or " Ireland," in any enactment passed before the establishment of the Irish Free State which applies to parts of His Majesty's dominions outside the United Kingdom, or outside the British Islands, as the case may be, shall, in the application of the enactment to any such part, be construed as references both

(a) to Great Britain and Ireland or the British Islands, exclusive of the Irish Free State, or as the case may be, to Ireland exclusive of the Irish Free State; and

(b) to the Irish Free State.

(*a*) Statutory Rules and Orders, 1923, No. 405. Only such parts of the Order are printed as are material in connection with this book.

(*b*) These Acts relate for the most part to subjects outside the scope of this book. It may, however, be noted that one of the exceptions in the Schedule relates to the definition of " British Islands " in s. 18 of the Interpretation Act, 1889, so far as that section applies to the interpretation of any Act passed after the establishment of the Irish Free State.

Provided that where by any enactment the Isle of Man and the Channel Islands are to be deemed for the purposes of the enactment to form part of the United Kingdom, they shall not, for the purposes of this Article, be deemed to be parts of His Majesty's dominions outside the United Kingdom.

11. Where any Act applies to, or may be applied to, any part of His Majesty's dominions outside the United Kingdom or the British Islands as the case may be, nothing in this Order shall be construed as applying the Act or making the Act applicable to the Irish Free State as such a part of His Majesty's dominions as aforesaid unless and until provision is made for the purpose by the Parliament of the Irish Free State in pursuance of the powers conferred by s. 3 of the Irish Free State Constitution Act, 1922.

13. Nothing in this Order shall affect the construction to be placed on any expression if and so far as the provision in which the expression occurs has reference either expressly or by necessary implication to a state of affairs existing before the establishment of the Irish Free State.

16. Nothing in this Order shall affect the construction, in its application to the Irish Free State, of any Act which by virtue of Article 73 of the Irish Free State Constitution is to continue in force within the Irish Free State.

17. This Order so far as it relates to Northern Ireland, and as the matters contained therein are matters with respect to which the Parliament of Northern Ireland has power to make laws, shall be subject to alteration or revocation by Acts passed by that Parliament.

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Printed in Great Britain by The Eastern Press, Ltd., Reading.

LIST D. *March, 1927.*

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HUNTER's Introduction or KELKE's Primer. SANDARS' Justinian. For final revision, GARSIA's Roman Law in a Nutshell.

CONSTITUTIONAL LAW AND LEGAL HISTORY.
CHALMERS & ASQUITH. THOMAS's Leading Cases. POTTER's Legal History, or HAMMOND's Legal History. For final revision, GARSIA's Constitutional Law and Legal History in a Nutshell.

CRIMINAL LAW AND PROCEDURE.
ODGERS' Common Law, or WILSHERE's Criminal Law, and WILSHERE's Leading Cases. For final revision, GARSIA's Criminal Law in a Nutshell.

REAL PROPERTY.
WILLIAMS (with WILSHERE's Analysis), or EDWARDS. For revision, GARSIA's Real Property and Conveyancing in a Nutshell.

CONVEYANCING.
DEANE & SPURLING's Introduction, and CLARK's Students' Precedents.

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Suggested Course of Reading for the Solicitors' Final Examination.

For detailed Courses see Steele's Self-Preparation for the Final Examination.

COMMON LAW.

Indermaur's Principles of the Common Law.
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